

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**APPENDIX TO BRIEF
FOR APPELLANT**

IN THE
United States Court of Appeals

UNITED STATES
FOR THE DISTRICT OF COLUMBIA COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

—
No. 7851
—

FILED AUG 18 1941

765
Joseph A. Padway

EVERETT M. GUDMUNDSON, *Appellant*,

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER,
DISTRICT OF COLUMBIA COMPENSATION DIS-
TRICT AND TRAVELERS INSURANCE COM-
PANY, A CORPORATION, *Intervener-Appellee*.

—
Appeal from the District Court of the United States
for the District of Columbia.
—

JOSEPH A. PADWAY,
ROBERT A. WILSON,
Bowen Bldg.,
Washington, D. C.

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IN THE
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FOR THE DISTRICT OF COLUMBIA

No. 7851.

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v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER,
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TRICT AND TRAVELERS INSURANCE COM-
PANY, A CORPORATION, *Intervener-Appellee*.

Appeal from the District Court of the United States
for the District of Columbia.

APPENDIX TO BRIEF FOR APPELLANT.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS
DESIGNATED BY APPELLANT.**

1 *Complaint For Mandatory Injunction*

Now comes the plaintiff above named, and for a cause of
action against the defendant alleges:

1. That the plaintiff, a carpenter by trade, is a resident
and citizen of the District of Columbia.

2. That the defendant is the Deputy Commissioner, District of Columbia Compensation District.

3. That on or about the 22nd day of February, 1939, plaintiff entered into a contract of hire, within the District of Columbia, with the Senn-Herrick Corporation, a corporation organized and existing under the laws of the State of New York.

4. That pursuant to this contract of hire plaintiff worked as a carpenter for the said Senn-Herrick Corporation on the construction of the National Institute of Health, located in Bethesda, Maryland, and at the construction project known as the Mellon Art Gallery, on Constitution Avenue, in the District of Columbia.

5. That the Senn-Herrick Corporation was carrying on employment within the District of Columbia.

2 6. That plaintiff was injured on the 25th day of May, 1939, during the course of his employment while employed on the construction of buildings of the National Institute of Health, located in Bethesda, Maryland.

7. That on March 4, 1940, plaintiff filed a claim for compensation under Title 19, Chapter 2, Section 11, of Code of the District of Columbia, entitled Employees' Compensation Act.

8. That a hearing was held by the defendant, Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation District, on May 2, 1940, for the sole purpose of determining the jurisdiction of the said Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation District, over the plaintiff's claim for compensation.

9. That on May 22, 1940, the defendant, Frank A. Cardillo, filed in the office of the Deputy Commissioner a compensation order (a copy of which is annexed hereto and marked Exhibit A, and made a part hereof), rejecting the plaintiff's claim for compensation, for the reason that the claim did not come within the provisions of the District of Columbia Workmen's Compensation Law.

10. That the said compensation order is not in accordance with law for the following reasons:

(a) That said order is based upon findings of fact which are not supported by any evidence, and said order is, therefore, not in accord with Section 20, 44 Stat. 1436; 33 U. S. C. A. 920.

(b) That said order is not in accord with Title 19, Chapter 2, Section 11, of the Code of the District of Columbia, and is contrary thereto.

11. That under the circumstances here present it is the duty of defendant or his successor in office, under
3 Section 19, 44 Stat. 1435, as amended June 25, 1938, C. 685, Section 952, Stat. 1167; 33 U.S.C.A. 919, to proceed to an adjudication of the claim on its merits.

Wherefore, plaintiff prays:

1. That the Court cause appropriate process to issue against the defendant, or his successors in office, and require the defendant, or his successors, to answer this Bill of Complaint, as provided by the rules of this Court and by the law.

2. That the Court order a true copy of the transcript of the record in the proceeding wherein said order was entered, including testimony, evidence and exhibits taken, the findings, conclusions and order of said defendant be brought before the Court, and that said record be made a part of this Bill of Complaint.

3. That said record, including testimony, evidence and exhibits taken, the findings, conclusions and order be reviewed by this Court, and that said order rejecting jurisdiction over plaintiff's claim be suspended and set aside, and that defendant or his successors in office be ordered to take jurisdiction over plaintiff's compensation claim and proceed to adjudication of plaintiff's claim on its merits.

4. And for such other and further relief in the premises as to the Court may seem meet.

EVERETT M GUDMUNDSON

Plaintiff.

Dated this 17th day of June, 1940.

* * * * *

5

Stipulation

Plaintiff and defendant in the above-entitled action hereby stipulate and agree to consider the transcript of the testimony taken before Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, on May 2, 1940, in the case of Everett M. Gudmundson, claimant, v. Senn-Herrick Corporation, employer, and The Travelers Insurance Company, insurance carrier, Case No. 12009-55, as exhibit to the complaint for mandatory injunction filed in the above-entitled action, said transcript of the testimony to be read as part of plaintiff's complaint.

Plaintiff and defendant further stipulate and agree that there is an error in the copy of the compensation order filed by the deputy commissioner in said case on May 22, 1940, and annexed to the complaint as plaintiff's Exhibit "A", in that in line 2, page 2 of said compensation order,
 6 after the word "claimant", the following was inadvertently omitted from said order:

"received compensation payments; that on March 4, 1940, the claimant".

JOSEPH A. PADWAY,
 ROBERT A. WILSON,
Attorneys for Plaintiff.

EDWARD M. CURRAN,
United States Attorney.

ALBERT GOLDSTEIN,
*Assistant United States Attorney,
 Attorneys for Defendant Cardillo.*

7 *Motion of Defendant Cardillo to Dismiss Complaint for Mandatory Injunction*

Now comes the defendant, Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, by his attorneys, and moves this Honorable Court to dismiss the complaint filed herein for the following reasons:

1. The complaint filed herein does not state a cause of action and does not entitle plaintiff to any relief in law or equity, nor does the complaint state a claim against the defendant upon which relief can be granted.

2. That it appears from the complaint with exhibits, including the transcript of testimony taken at the hearing before the deputy commissioner on May 2, 1940, and made a part thereof by stipulation, that the findings of fact of the deputy commissioner in the compensation order filed by the defendant deputy commissioner on May 22, 1940, complained of in the complaint, in which the deputy commissioner rejected the claim of Everett M. Gudmundson (plaintiff), are supported by evidence and said compensation order is in all respects in accordance with law.

8 3. That it appears from the complaint with exhibits, including said transcript of testimony, that plaintiff sustained injury while working in the State of Maryland on a major operation and at a fixed place of employment; that he has been awarded compensation under the compensation law of that State for disability resulting from said injury; that his contract of hire was made in the State of Maryland that no "employment" existed in the District of Columbia at the time of said injury; that, therefore, the deputy commissioner properly found from the evidence that plaintiff's claim for compensation did not come within the purview of the District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, Chapter 612, Sections 1 and 2; D. C. Code, 1929, Title 19, Chapter 2, Sections 11 and 12), which made applicable to employees in certain employments in the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C. Title 33, Chapter 18, Sections 901, et seq.)

4. For such other good and sufficient reasons as may be shown.

EDWARD M. CURRAN,
United States Attorney.

ALBERT GOLDSTEIN,
*Assistant United States Attorney,
Attorneys for Defendant Cardillo.*

* * * * *

9 *Motion for Leave to Intervene.*

Now comes the Travelers Insurance Company, a corporation, and moves this Honorable Court for leave to intervene and be made a party defendant in the above-entitled cause and to file such pleading as it may be advised to the Complaint of the plaintiff, and for reasons therefor says: that it is the same Travelers Insurance Company mentioned in the compensation order annexed to said Bill of Complaint and marked Exhibit A and made a part thereof; that at the time of his injury the plaintiff was an employee of the Senn-Herrick Corporation, for which the Travelers Insurance Company was the compensation insurance carrier under its policy of insurance and in compliance with the compensation law of the District of Columbia; that by reason thereof said Travelers Insurance Company has an interest in this cause adverse to the plaintiff, in that it may be under obligation to pay the plaintiff whatever compensation award may be declared to be final in this case under said District of Columbia Workmen's Compensation Law.

SWINGLE AND SWINGLE,
By ERNEST A. SWINGLE,
*Attorneys for the Travelers Insurance
Company, a corporation, intervenor,
805 Colorado Building,
Washington, D. C.*

Trial Attorney: Edwin A. Swingle.

* * * * *

11 *Order Granting Leave to Intervene*

Upon consideration of the motion of the Travelers Insurance Company, a corporation, to intervene herein, filed herein on the 11th day of July, 1940, it is, by the Court, this 11th day of July, 1940,

Ordered that the said Travelers Insurance Company, a corporation, be, and it is, hereby granted leave to intervene herein, and the said Travelers Insurance Company is hereby made a party defendant in the above-entitled cause, and is granted twenty days from the date hereof to plead as it may be advised.

By the Court,

DANIEL W. O'DONOGHUE
Justice.

No Objection:

JOSEPH A. PADWAY & ROBERT A. WILSON

Attorney for Plaintiff.

EDWIN A. SWINGLE

Attorney for Petitioner.

EDWARD M. CURRAN

Attorney for Dept. Cardillo

12 *Motion of Defendant Travelers Insurance Company
To Dismiss Complaint for Mandatory Injunction.*

Now comes the defendant, The Travelers Insurance Company, a corporation, by its attorneys, and moves this Honorable Court to dismiss the complaint filed herein for the following reasons:

1. The complaint filed herein does not state a cause of action and does not entitle plaintiff to any relief in law or equity, nor does the complaint state a claim against the defendants upon which relief can be granted.

2. That it appears from the complaint with exhibits, including the transcript of testimony taken at the hearing before the Deputy Commissioner on May 2, 1940, and made a part thereof by stipulation, that the findings of fact of the Deputy Commissioner in the compensation order filed

by the Deputy Commissioner on May 22, 1940, complained of in the complaint, in which the Deputy Commissioner rejected the claim of Everett M. Gudmundson (plaintiff), are supported by evidence and said compensation order is in all respects in accordance with law.

3. That it appears from the complaint with exhibits, including said transcript of testimony, that plaintiff sustained injury while working in the State of Maryland on a major operation and at a fixed place of employment; that he has been awarded compensation under the compensation law of that State for disability resulting from said injury; that his contract of hire was made in the State of Maryland; that no "employment" existed in the District of Columbia at the time of said injury; that, therefore, the Deputy Commissioner properly found from the evidence that plaintiff's claim for compensation did not come within the purview of the District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, Chapter 612, Sections 1 and 2; D. C. Code, 1929, Title 19, Chapter 2, Sections 11 and 12), which made applicable to employees in certain employments in the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C. Title 33, Chapter 18, Sections 901, et seq.)

4. For such other good and sufficient reasons as may be shown.

SWINGLE AND SWINGLE,

By ERNEST A. SWINGLE,

805 Colorado Building,

Washington, D. C.

Attorneys for the Travelers Insurance Company.

* * * * *

14 *Memorandum Sustaining Motions to Dismiss*

I have considered the motions to dismiss the complaint filed in this cause. It appears the complaint is based upon a claim that a so-called "compensation order" filed by the

defendant, Deputy Commissioner United States Employees' Compensation Commission, is not in accordance with law, because based upon findings of fact not supported by evidence and because contrary to specified provisions of the District of Columbia Code. By written stipulation the transcript of testimony taken before the Deputy Commissioner is treated as an exhibit to, and may be read as a part of, the complaint. The relief sought is by way of mandatory injunction to the Deputy Commissioner requiring him to take jurisdiction over plaintiff's compensation claim and to make an adjudication of such claim on its merits.

It is apparent, from the manner in which the complaint is framed, that the plaintiff seeks to have this Court make a determination, as a matter of law, that the Deputy Commissioner had jurisdiction to pass upon plaintiff's compensation claim, and that insofar as any facts are concerned, this Court shall look to the evidence adduced before the Deputy Commissioner. I find no authority to follow such procedure. The sole right of review given by the "Longshoremen's and Harbor Workers' Compensation Act", is that "if not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise * * *." It is noted this

15 language plainly refers only to a "compensation order", not an order made by the Deputy Commissioner with regard to his jurisdiction. If a right exists in this Court to pass upon the question of jurisdiction of the Deputy Commissioner it is by way of a trial *de novo*, not by way of passing upon the legal sufficiency of the evidence before the Deputy Commissioner. *Crowell v. Benson*, 285 U. S. 22. The question of the existence of this right does not seem to be presented by the complaint as now drawn and, therefore, is not decided.

The pending motions to dismiss will be sustained.

BOLITHA J. LAWS

Justice.

November 5, 1940

16 *Order Sustaining Motions to Dismiss Complaint.*

Upon consideration of the motions hereinbefore filed by the defendant and the intervening defendant to dismiss the complaint, and after oral argument of counsel in open Court, it is this 12th day of November, 1940,

Adjudged, Ordered and Decreed that the complaint be and it hereby is dismissed.

BOLITHA J. LAWS,
Justice.

17 *Motion for Leave to Amend*

Comes now the plaintiff and moves this Honorable Court for leave to amend his Complaint For Mandatory Injunction as follows:

That Paragraph #5 of the Complaint be amended to read: "5. That the Senn Herrick Corporation was carrying on employment within the District of Columbia during all the times herein mentioned and was subject to Title 19, Chapter 2, of the Code of the District of Columbia entitled Employees Compensation Act."

That Paragraph #6 of the Complaint be amended to read: "6. That the plaintiff was injured on the 25th day of May, 1939, during the course of said employment while working on the construction of buildings of the National Institute of Health, located in Bethesda, Maryland."

That Paragraph #7 of the Complaint be amended to read: "7. That on March 4, 1940, Plaintiff filed a claim for compensation under Title 19, Chapter 2, Section 11 of the Code of the District of Columbia, entitled Employees Compensation Act, (a copy of which is annexed hereto and marked Exhibit A and made a part hereof)."

18 That Paragraph #9 of the Complaint be amended to read: "9. That on May 22, 1940 the Defendant, Frank A. Cardillo, filed in the office of the Deputy Commissioner a compensation order (a copy of which is annexed hereto and marked Exhibit B and made a part hereof), rejecting the Plaintiff's claim for compensation, for

the reason that the claim did not come within the provisions of the District of Columbia Workmen's Compensation Law."

That Paragraph #10 of the Complaint be amended to read: "10. That the said compensation order is not in accordance with law but contrary thereto for the reason:

(a) That Plaintiff is entitled to compensation under the provisions of Title 19, Chapter 2, Section 11 of the Code of the District of Columbia

(b) That said compensation order is not supported by the evidence adduced at said hearing before the Deputy Commissioner.

That Paragraph #2 of the Prayer of the Complaint be amended to read: "2. That the Court grant to Plaintiff a trial *de novo* for the purpose of hearing testimony and taking evidence for a determination of the jurisdiction of defendant, Deputy Commissioner, over Plaintiff's claim for compensation."

That Paragraph #3 of the Prayer of the Complaint be amended to read: "3. That this Court order the said compensation order rejecting Plaintiff's claim be suspended and set aside, and that defendant or his successors in office be ordered to take jurisdiction over Plaintiff's compensation claim and proceed to an adjudication of plaintiff's claim on its merits."

That the Complaint be further amended by striking therefrom the transcript of testimony taken before
19 the Deputy Commissioner which was made a part of the Complaint by stipulation.

JOSEPH A. PADWAY
736 Bowen Bldg.

ROBERT A. WILSON
Attorneys for Plaintiff

Date, November 14, 1940

* * * * *

20 *Order Granting Motion for Leave to Amend Complaint for Mandatory Injunction*

Upon consideration of the Motion hereinbefore filed by the Plaintiff for leave to amend his Complaint For Mandatory Injunction, and after argument thereon by counsel for all parties, it is this 2d. day of December 1940,

Ordered, Adjudged And Decreed that the Plaintiff be and he is hereby granted leave to amend his Complaint For Mandatory Injunction within five days from the date hereof.

BOLITHA J. LAWS

Justice

Exceptions to this Order noted in open Court, 12/2/40

E. A. SWINGLE

Atty for Travelers Ins. Co.

W. E. BOOTE

Atty for Cardillo

21 *Amended Complaint for Mandatory Injunction*

The Amended Complaint For Mandatory Injunction of the plaintiff above-named, filed pursuant to permission granted by this Honorable Court, respectfully represents to this Honorable Court:

1. That the plaintiff, a carpenter by trade, is a resident and citizen of the District of Columbia.

2. That the defendant is the Deputy Commissioner, District of Columbia Compensation District.

3. That on or about the 22nd day of February, 1939, plaintiff entered into a contract of hire, within the District of Columbia, with the Senn-Herrick Corporation, a corporation organized and existing under the laws of the State of New York.

4. That pursuant to this contract of hire plaintiff worked as a carpenter for the said Senn-Herrick Corporation on the construction of the National Institute of Health, located

in Bethesda, Maryland, and at the construction project known as the Mellon Art Gallery, on Constitution Avenue, in the District of Columbia.

5. That the Senn Herrick Corporation was carrying on employment within the District of Columbia during
22 all the times herein mentioned and was subject to the Title 19, Chapter 2, of the Code of the District of Columbia entitled Employees Compensation Act.

6. That the Plaintiff was injured on the 25th day of May, 1939 during the course of said employment while working on the construction of buildings of the National Institute of Health, located in Bethesda, Maryland.

7. That on March 4, 1940, Plaintiff filed a claim for compensation under Title 19, Chapter 2, Section 11 of the Code of the District of Columbia, entitled Employees Compensation Act, (a copy of which is annexed hereto and marked Exhibit A and made a part hereof).

8. That a hearing was held by the defendant, Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation District, on May 2, 1940, for the sole purpose of determining the jurisdiction of the said Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation District, over the plaintiff's claim for compensation.

9. That on May 22, 1940 the defendant, Frank A. Cardillo, filed in the office of the Deputy Commissioner a compensation order (a copy of which is annexed hereto and marked Exhibit B and made a part hereof), rejecting the Plaintiff's claim for compensation, for the reason that the claim did not come within the provisions of the District of Columbia Workmen's Compensation Law.

10. That the said compensation order is not in accordance with law but contrary thereto for the reason

(a) That plaintiff is entitled to compensation under the provisions of Title 19, Chapter 2, Section 11 of the Code of the District of Columbia

(b) That said compensation order is not supported by the evidence adduced at said hearing before the Deputy Commissioner.

11. That under the circumstances here present it is the duty of defendant or his successor in office, under
23 Section 19, 44 Stat. 1435, as amended June 25, 1938, C. 685, Section 952, Stat. 1167; 33 U. S. C. A. 919, to proceed to an adjudication of the claim on its merits.

Wherefore, plaintiff prays:

1. That the Court cause appropriate process to issue against the defendant, or his successors in office, and require the defendant, or his successors, to answer this Bill of Complaint, as provided by the rules of this Court and by the law.

2. That the Court grant to plaintiff a trial *de novo* for the purpose of hearing testimony and taking evidence for a determination of the jurisdiction of defendant, Deputy Commissioner, over plaintiff's claim for compensation.

3. That this Court order the said compensation order rejecting plaintiff's claim be suspended and set aside, and that defendant or his successors in office be ordered to take jurisdiction over plaintiff's compensation claim and proceed to an adjudication of plaintiff's claim on its merits.

4. And for such other and further relief in the premises as to the Court may seem meet.

EVERETT M. GUDMUNDSON

Plaintiff

Dated this 4th day of December, 1940

* * * * *

25 *Motion of Intervening Defendant, the Travelers Insurance Company, to Dismiss Amended Complaint for Mandatory, Injunction*

Now comes the intervening defendant, the Travelers Insurance Company, a corporation, and moves this Honorable Court to dismiss the Amended Complaint filed herein for the following reasons:

1. The Amended Complaint fails to state a claim upon which relief can be granted.

2. This Honorable Court lacks jurisdiction to grant a trial *de novo* in this case.

3. The Amended Complaint makes a new or different demand after the expiration of the statutory period within which demand must be made.

4. The compensation order mentioned in the Amended Complaint is supported by the evidence adduced at the hearing before the Deputy Commissioner.

SWINGLE AND SWINGLE,
By ERNEST A. SWINGLE,
805 Colorado Bldg.,
Washington, D. C.,
*Attorneys for the Travelers Insurance Co.,
Intervening Defendant.*

* * * * *

26 *Motion of Defendant Cardillo to Dismiss Amended
Complaint for Mandatory Injunction*

Now comes the defendant Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, by his attorneys, and moves this Honorable Court to dismiss the amended complaint for mandatory injunction filed herein for the following reasons:

1. That the amended complaint filed herein does not state a cause of action and does not entitle plaintiff to any relief in law or equity, nor does the said amended complaint state a claim against the defendant upon which relief can be granted.

2. That the findings of fact of the deputy commissioner in the compensation order filed on May 22, 1940, complained of in the amended complaint, in which the deputy commissioner rejected the claim of Everett M. Gudmundson (plaintiff), are supported by competent evidence in the transcript of the testimony taken at the hearing before the deputy commissioner on May 2, 1940, and said findings of fact

should, therefore, be regarded by the Court as final and conclusive.

27 3. That it is contended in paragraph numbered 10(b) of said amended complaint that "said compensation order is not supported by the evidence adduced at said hearing before the Deputy Commissioner", and plaintiff has failed to attach to the amended complaint the transcript of the testimony taken at said hearing for examination by the Court.

4. That the said amended complaint prays for relief which is beyond the power of the Court to grant in that said amended complaint prays the Court to grant a trial *de novo*; that the Court is without jurisdiction to hear the evidence *de novo* or to redetermine the weight of the evidence taken before the deputy commissioner in a compensation proceeding under the District of Columbia workmen's compensation law; that under the law the findings of fact of the deputy commissioner, supported by evidence, are to be regarded as final and conclusive.

5. That plaintiff's request for trial *de novo* in this case is not based upon a proper premise in that no constitutional question is raised in said amended complaint, nor does the amended complaint state or suggest that any new or further evidence will be produced, nor are any new facts alleged.

6. That the defendant Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, is given power under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (U. S. C. A., Title 33, Chapt. 18), as made applicable to the District of Columbia by the Act of May 17, 1928 (D. C. Code, Title 19, Chapt. 2), to hear, consider and weigh the evidence in cases presented to him in the administration of said Act; that the jurisdiction of the Court under section

21(b) of said Act is limited to a review of the compensation order complained of by plaintiff; that the
28 Act does not authorize the Court to grant a trial *de novo*, and the relief prayed for in the amended complaint

is improper and beyond the jurisdiction of the Court to grant.

7. That the said amended complaint introduces a new or different cause of action and plaintiff's request for trial *de novo* was not timely made.

8. For such other good and sufficient reasons as may be shown.

EDWARD M. CURRAN,
United States Attorney.

BERNARD J. LONG,
*Assistant United States Attorney,
Attorneys for Defendant Cardillo.*

29 *Order Sustaining Motions to Dismiss Amended Complaint*

Upon Consideration of the Motions hereinbefore filed by the defendant and the intervening defendant to dismiss the Amended Complaint, and after oral argument of counsel in open Court, and after judicial review of the compensation order as provided by Section 21 of the District of Columbia Compensation Act, it is this 27th day of January, 1941,

Ordered that the Motions of the Defendant and the intervening defendant to dismiss the Amended Complaint be, and the same are, hereby granted and that the Amended Complaint be, and it is, hereby dismissed.

T. ALAN GOLDSBOROUGH,
Justice.

No Objection as to Form.

Exception taken in open court
this 27th day of January,
JOSEPH A. PADWAY
ROBERT A. WILSON,
Counsel for plaintiff

30

Notice of Appeal

Notice is hereby given this 13th day of February, 1941, that the Plaintiff, Everett M. Gudmundson, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of January, 1941, in favor of Defendant, Frank A. Cardillo, Deputy Commissioner, and Intervenor, Travelers Insurance Company, against said Plaintiff, Everett M. Gudmundson.

JOSEPH A. PADWAY,
ROBERT A. WILSON,
Attorneys for Plaintiff,
736 Bowen Building,
Washington, D. C.

Memorandum

February 14-1941.

Cost Bond (\$250.00) on appeal—filed.

31

Statement of Points

Comes now the plaintiff by his attorneys Joseph A. Padway and Robert A. Wilson and states as points and reasons why the judgment herein should be reversed:

(1) The Court erred in sustaining the motions of defendant Frank A. Cardillo deputy commissioner, District of Columbia Compensation District, and intervenor Travelers Insurance Company, to dismiss amended complaint for mandatory injunction and in rendering judgment for said defendant and said intervenor.

(2) The Court erred in denying the prayer of the plaintiff for a trial de novo and erred in failing to reweigh the evidence adduced at the hearing before the deputy commissioner, District of Columbia Compensation District.

(3) The Court erred in rendering judgment for
32 said defendant and said intervenor because the findings of fact and compensation order rejecting plaintiff claim for compensation of the defendant deputy com-

missioner, District of Columbia Compensation District and the judgment of the court sustaining said compensation order, are not supported by any evidence and are contrary to the uncontradicted evidence and therefore are not in accordance with law.

JOSEPH A. PADWAY,
ROBERT A. WILSON,
Attorneys for Plaintiff,
736 Bowen Building,
Washington, D. C.

* * * * *

33 *Order as to Original Papers and Exhibits*

With consent of all parties hereto it is hereby ordered that the original copies of,

(1) The copy of the plaintiff's claim for compensation, annexed to, and marked Exhibit A of, Amended Complaint for Mandatory Injunction,

(2) Copy of the Findings of Fact and Compensation ordered of Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation Commission attached to and marked Exhibit B of Amended Complaint for Mandatory Injunction,

(3) The Transcript of the Record of the Proceedings before the Deputy Commissioner, District of Columbia Compensation Commission including all exhibits introduced therein, which was made an exhibit to the Complaint by stipulation of the parties, be transmitted to the Court

34 of Appeals for the District of Columbia on appeal in lieu of copies thereof.

Dated this 24th day of February, 1941.

T. ALAN GOLDSBOROUGH,
Justice.

We Consent

EDWARD M. CURRAN, U. S. District Attorney

W. E. BOOTE

by W. E. BOOTE

Attorneys for defendant appellees

SWINGLE AND SWINGLE

by ERNEST A. SWINGLE

Attorneys for intervenor appellees

JOSEPH A. PADWAY and ROBERT A. WILSON

by ROBERT A. WILSON

Attorneys for appellant

40

Appellant's Exhibit A

Filed Dec 4-1940 Charles E. Stewart, Clerk

District of Columbia Workmen's Compensation Act

Office of Deputy Commissioner

Washington, D. C.

Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the Longshoremen's Act)

Injured Person:

1. Name of employee: Everett M. Gudmundson. Employee's check No.

2. Address: Street and No.: 538 10th St. S. E. City or Town: Washington, D. C.

3. Sex: Male. Age..... Married, single, widowed: Married.

4. Do you speak English? Yes. Nationality: American.

5. State regular occupation: Carpenter.

6. What were you doing when injured? Working on scaffold.

7. (a) Wages or average earnings per day: \$12.00 (Include overtime, board, rent, and other allowances.) (b) Per week; \$60.00 (c) Were you employed elsewhere during week in which you were injured? No. (d) If so, state where and when:

8. Were you paid full wages for day of accident? Yes.

Employer:

9. Employer: Senn Herrick Construction Co.

10. Office address: New York, N. Y.

11. Nature of business: Contractors Branch: 15th & Eye Sts. N.W.

The Injury:

12. Place where injury occurred: Bethesda, Md.—Cancer Hospital Job.

13. Name of foreman: Ralph Link

14. Date of accident or first illness, the 25th day of May, 1939, at 3:45 o'clock P. M.

15. How did accident happen or how was occupational disease caused? Plank fell from floor above while I was working on a scaffold. It hit me over the left eye—and knocked me off.

Nature and Extent of Injury:

16. State fully nature of injury or occupational disease: Laceration of face, left side; fracture left wrist; fracture 6th dorsal vertebrae; loss of sight in left eye—hearing impaired.

17. On what date did you stop work because of injury? May 25, 1940

18. Have you returned to work? (Yes or No.) Yes. If "yes", on what date? January 9, 1940.

19. Does injury keep you from work? (Yes or No.) Yes.

41 20. Have you done any work in period of disability? Yes.

21. Have you received any wages since injury? Yes. If so, from and to what date? Jan. 9th to present time (working Part time)

22. Has injury resulted in amputation? No. A. If so, describe same.

23. Did you request your employer to provide medical attendance? No. Has he done so? Yes.

24. Attending physician:* Name: Dr. Adkinson—Address: 1835 Eye St.

25. Hospital: Name: Emergency Address: 1711 N. Y. Ave. N. W.

26. Have you given your employer notice of Injury? (Yes or No.) Yes When? May 25, 1939. Jan. 15, 1940.

27. If such notice was given, to whom? Foreman—Corporation

28. Was it given orally or in writing? Orally in Maryland—written in District of Columbia.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

*Dr. Walker—1835 Eye St.

Dr. Griffith—1905 K St.

Signed by EVERETT M. GUDMUNDSON

Claimant

Mail address 538 10th St. S. E.

Dated March 4, 1940

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(Exhibit B)

Filed Dec 4-1940 Charles E. Stewart, Clerk

United States Employees' Compensation Commission
 District of Columbia Compensation District

Compensation Order
 Rejection of Claim
 Case No. 12009-55

In the Matter of the claim for compensation under the
 District of Columbia Workmen's Compensation Act

EVERETT M. GUDMUNDSON, *Claimant*

vs.

SENN-HERRICK CORPORATION, *Employer*
 THE TRAVELERS INSURANCE COMPANY, *Insurance Carrier*

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 25th day of May, 1939, the claimant above named was in the employ of the employer above named, at the National Institute of Health, Bethesda, Maryland; that the liability of the employer for compensation under the Maryland Workmen's Compensation Law and under the District of Columbia Workmen's Compensation Law was insured by the Travelers Insurance Company; that on the said day the claimant herein, while performing service as a carpenter for the employer in the state of Maryland, sustained injury resulting in his disability; that a claim for compensation was thereafter filed by the injured employee with the State Industrial Accident Commission under the compensation law of the State of Maryland; that an award of compensation was made by the said Commission under the Maryland compensation law and

43

42

(Exhibit B)

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Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact

That on the 25th day of May, 1939, the claimant above named was in the employ of the employer above named, at the National Institute of Health, Bethesda, Maryland; that the liability of the employer for compensation under the Maryland Workmen's Compensation Law and under the District of Columbia Workmen's Compensation Law was insured by the Travelers Insurance Company; that on the said day the claimant herein, while performing service as a carpenter for the employer in the state of Maryland, sustained injury resulting in his disability; that a claim for compensation was thereafter filed by the injured employee with the State Industrial Accident Commission under the compensation law of the State of Maryland; that an award of compensation was made by the said Commission under the Maryland compensation law and

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herein in Bethesda, Maryland, until May 25, 1939, when the injury occurred; that at the time of the injury no employment existed in the District of Columbia; that the contract of hire was made in the State of Maryland; that a remedy under the Maryland Compensation Law had been provided the injured employee; that it is, therefore, unlikely that the employee will become a public charge in the District of Columbia; that for the construction work performed in Bethesda, Maryland, the employer was not subject to the provisions of the District of Columbia workmen's compensation law; that the claim for compensation filed by the claimant under the District of Columbia Workmen's compensation law is not within the purview of the said law.

Upon the foregoing findings of fact, it is ordered by the Deputy Commissioner that the claim for compensation be and it hereby is REJECTED for the following reason:

1. That the claim does not come within the provisions of the District of Columbia workmen's compensation law.

Given under my hand at Washington, D. C. this twenty-second day of May, 1940.

(Signed) FRANK A. CARDILLO,
Deputy Commissioner.
District of Columbia Compensation District.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS DESIGNATED BY APPELLANT.

49 The Deputy Commissioner: Is that correct, Mr. Wilson?

By agreement of the parties, the only issue to be considered today is the issue of the jurisdiction under the District of Columbia Workmen's Compensation law.

Mr. Swingle: And the question of the election of the claimant, made in Maryland, that the case come under the same heading of jurisdiction.

The Deputy Commissioner: Now, it will also be understood that should I decide that there is jurisdiction upon review of the evidence taken today, the case will be continued and the parties afforded an opportunity to produce medical evidence. If I find that there is no jurisdiction, the compensation order will be issued without further hearing.

* * * * *

53 Everett M. Gudmundson, the claimant herein, was called as a witness for and in his own behalf, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Your full name? A. Everett M. Gudmundson.

Q. Your address? A. 538 Tenth Street, Southeast, Washington, D. C.

Q. Approximately how long have you resided in the District of Columbia? A. About seven years.

Q. Did you work for the Senn-Herrick Construction Corporation at the Mellon Art Gallery? A. Yes, sir.

54 Q. And of your knowledge, was there any carpenter work that would have to be performed there after you left the employ of the Senn-Herrick Construction Company? A. Yes, sir.

Q. I ask you, is it your practice as a carpenter to start work on one particular project, leave it, and then return at a later date to do more carpentry work on that same project? A. Yes, sir.

Q. That has been the practice, to your knowledge? A. Yes, sir. Other trades catch up with certain work and we have to take days off and be called back at a later date.

Q. When you left the Mellon Art Gallery job, where did you go to work then? A. I went over to McCloskey on the Printing Office job.

The Deputy Commissioner: Will you fix the time for that, when he left the Mellon job?

Mr. Wilson: Yes, sir.

By Mr. Wilson:

Q. When did you leave the Mellon job? A. I had—

Mr. Swingle (interposing): October 19, wasn't it?

The Witness: Something like that.

Mr. Wilson: I believe one of the exhibits will show that.

I would like to ask you first, was Ralph Lenck employed on that job as a carpenter, at the Government Printing Office job?

Q. And did he ask you while you were both employed there if you would like to return to work for the Senn-Herrick Construction Company? Just what did he say to you? A. He asked me if I wanted to go to work. He said that we have got work coming up at the Mellon Art Gallery and also at Bethesda.

The Deputy Commissioner: What is that man's name?

The Witness: Ralph Lenck.

The Deputy Commissioner: Who is Ralph Lenck?

The Witness: Carpenter foreman. He used only tools at this time.

The Deputy Commissioner: Continue your statement.

The Witness: I told him I would go when he got ready to call me and that when he called me that I would report.

The Deputy Commissioner: When did that take place, about, approximately?

Mr. Wilson: The approximate date?

The Deputy Commissioner: Yes.

The Witness: About the 2nd, I think it was, I started—the 24th of February, 1939.

By Mr. Wilson:

56 Q. Will you describe how and where you were employed by the Senn-Herrick Construction Company

at the time just prior to the accident? A. When I was employed?

Q. Yes. A. I was employed first on the Mellon Art Gallery and I worked there and I had a pretty steady job. I was the last man there. He told me there was going to be more work, and in the meantime they got another job at Bethesda, too, and when I was ready to start again I went back to work with him as the first man.

Q. Will you state how you were employed with reference to Ralph Lenck, that is, when he came over to your house the night before? A. Mr. Lenck came to my house the night before and asked me to come to work the next day, that he was ready for me.

Q. And he told you to report to Bethesda the next morning? A. That is right.

Q. With your tools, ready to work? A. That is right.

Q. When you went to work for the Senn-Herrick Construction Company at that time, did you know that it might be necessary for the Senn-Herrick Corporation to send some carpenters to the Mellon Art Gallery job from
57 that job in Bethesda, Maryland? A. I did.

Q. When you left the Government Printing Office job and went to work for the Senn-Herrick Construction Corporation, you, in part, relied on Mr. Lenck's statement concerning the amount of work that the Senn-Herrick Corporation had to do in this vicinity? A. Yes, I did, because I knew he had very capable men to do the work there at the Mellon Art Gallery and they would be very efficient.

Q. Was that when you were with the Senn-Herrick Corporation that they had the Mellon Art Gallery job and the Bethesda job? A. Mr. Lenck even mentioned—he said that we were going on the stairs of the Mellon Art Gallery.

Q. While you were working for Senn-Herrick Construction Company at Bethesda, Maryland, did you do any work

for the Senn-Herrick Construction Corporation in Washington, D. C.? A. Yes, I was sent once over to the District when I was over there.

Q. And where did you work in Washington, D. C.? 58 A. In the Mellon Art Gallery.

Q. Before you started working for the Senn-Herrick Construction Company at Bethesda, Maryland, were you signed up by anyone there? Did they take your Social Security number? A. No, sir.

Q. Not prior to starting the work? A. No, sir, it must have been a week. I was asked if I still lived at the same address.

Q. And that was several days after you worked there? A. That is right.

Q. When you went to work for the Senn-Herrick Construction Company, did you consider that you were going to work for the company or going to work merely for that job in Bethesda? A. Well, working for the company. That is the way that we work. We were obligated to go wherever we were sent to.

Mr. Wilson: Your witness.

* * * * *

60 Redirect Examination

By Mr. Wilson:

Q. When Ralph Lenck came to your house and asked you to report to work at Bethesda, Maryland, was he at that time employed as a foreman by the Senn-Herrick Construction Company? A. Yes.

* * * * *

61 Re-Cross Examination

* * * * *

Mr. Lenck spoke to you concerning the work at Bethesda on two different occasions? A. That is right.

62 Q. The first time was when you were both working as carpenters on the Printing Office job? A. That is right.

Q. Then it was some time after that when he came to your house?

* * * * *

The Witness: Well, that was the case, anyway. We were working and he was working on this Bethesda job and at the Government Printing Office, and he asked me if I would go out to the job. I understand that it was about a week or two before he went out there, but he left and got his things down there and he came to my house officially as a foreman, and he asked me if I was ready to report for work tomorrow morning, and I left the McCloskey job and went and got my tools early in the morning and went.

Mr. Swingle: He does not claim that he was working with his tools and at the same time was the foreman for the Senn-Herrick Construction Company. I understand that is the story?

The Witness: That is right.

63 By Mr. Swingle:

Q. On the day that Mr. Lenck was working with his tools alongside of you, do you maintain that on that same day that you were also being paid by the Senn-Herrick Construction Company as a foreman for them? A. No, I do not say that.

* * * * *

Q. Is that the first time he talked to you about
64 this? A. That is when he officially asked me to, but he talked to me before, if I would go out there, if I would consider it and go with him out there on the Mellon Art job. That is what he talked to me about.

* * * * *

65 By the Deputy Commissioner:

Q. When did you start to work for the Senn-Herrick Construction Company for the first time, Mr. Gudmundson? A. Second month, eighteenth day, of 1938; February 18, 1938.

Q. Was that the first time you worked for the Senn-Herrick Construction Company? A. Yes.

Q. And where did you work on that occasion? A. Mellon Art Gallery.

Q. Were you in the District of Columbia? A. Seventh and Pennsylvania.

Q. You worked there until that job was finished? A. We got caught up. Senn-Herrick Construction Corporation was not through with its work there. They still had
66 more work to do, but they were caught up to the other trades.

Q. Was that as far as the employer could have gotten at that time? A. That is right.

Q. And approximately when did you finish working there? A. Well, I finished working there October 14.

Q. 1938? A. 1938, that is right.

Q. And where did you go thereafter, where did you work after that? A. I went to work for the McCloskey Corporation on the Printing Office.

Q. That is a Government job? A. At the Government Printing Office.

Q. You worked there for how long? A. I worked there until February 23, 1939.

Q. Now, at McCloskey's, the Government Printing Office, was Lenck employed there with you? A. Yes, sir. He was employed there the same as I was.

Q. As an ordinary carpenter? A. As an ordinary carpenter.

Q. Not as a foreman? A. No, sir.

Q. How long did he work at the Government Printing Office; do you know? A. I don't know exactly.

67 Q. Did he quit some time before that day? A. That is right, sir. He quit some time before—it must have been two weeks, something like that, two or three weeks.

Q. Was Lenck working at the Government Printing Office when he first organized the Bethesda job for Senn-

Herrick Construction Corporation? A. Yes, he was, and he mentioned that—

Q. (Interposing) Just answer the question, please.

Was he working at the Government Printing Office in addition to the first-mentioned Bethesda job? A. Yes, sir.

Q. He was? A. Yes.

Q. What did he say on that occasion; what did he tell you? A. He asked me if I would be interested in going out for the Senn-Herrick Construction Corporation and that he thought it was about a twelve or seven months' job between that job and the Mellon Art Gallery. The stairs were going up on that job and that this job was drawing to a close. He maintained that he had about three or four weeks left on the McCloskey job.

Q. Did he tell you he was going there? A. Yes, he was going there as a foreman.

68 Q. He told you that he was going there as a foreman? A. That is right.

Q. About how much time elapsed from the date of that first conversation to the date when he came to your home and asked you to go to Bethesda? Was it a matter of days, weeks, or months, or was it the next day? A. It was not over three weeks.

Q. About three weeks? Do you know whether or not he had continued to work at the Government Printing Office during that period or had he left about that time? A. He left.

Q. He left shortly after he spoke to you, then? A. That is right.

* * * * *

Q. Then you had not heard from him until the evening of February 23, 1939? A. That is right.

Q. Now, when did you report to the Bethesda job? A. The next day. The very next morning.

69 Q. February 24? A. Yes.

Q. What time? A. The starting time, seven-thirty.

Q. Did you start to work immediately? A. Yes, sir.

Q. Right after you got there? A. Yes, sir.

* * * * *

Q. And did you start to work at the regular prescribed hour in the morning? A. That is right.

Q. What time was that, about? A. Seven-thirty.

Q. Seven-thirty. Whom did you report to when you first got to the job out at Bethesda? A. To Mr. Lenck.

Q. To Mr. Lenck. Is that the only job that you worked on for the Senn-Herrick Construction Company prior to the Bethesda job? That is, at the Mellon Art Gallery? A. That is right.

Q. That is the only place you worked for the Senn-Herrick Construction Company? A. Yes, sir.

70 Q. Do you know whether or not the Senn-Herrick Construction Company maintained an office in Maryland? A. I don't know whether or not they do maintain an office there. They have some sort of office.

Q. If you do not know, say so; do not guess. A. They had no office when I came out there.

Q. When you started to work you went to some sort of office? A. There is an office right at the place.

Q. Where the construction work is going on? A. That is practically a tool shed.

Q. Did you continue to work there steadily from then on until the day that you were hurt? A. Except in bad weather, only I got sent once to the Mellon Art Gallery one day when I was working there.

Q. Who sent you to the Mellon Art Gallery? A. Mr. Lenck.

Q. Just for one day's work? A. Yes, it was a little less than a day; half a day. I went there in the afternoon to do some work for this company.

Q. Do you know about how long that job in Bethesda would have lasted? A. Well no. I imagine four or five months, something like that. They have a record when I

71 was through. I don't know exactly how long it lasted. I got hurt and I didn't keep up with it.

Q. Do you know whether or not the Mellon Art Gallery job was terminated at the time that you were hurt on May 25, 1939? Was the Mellon Art Gallery job finished? A. No, sir, they are still working on it.

Q. In so far as your employer is concerned, did the Senn-Herrick Construction Company terminate this work on that job? A. No, sir, they were not finished. It is not terminated yet. They still have work to do there.

* * * * *

Q. On this Mellon Art job, the Senn-Herrick Construction Company was a subcontractor; is that correct? A. That is right.

Q. So that their work was not constant or they were called back for different jobs? A. They had a contract on certain things to finish.

* * * * *

Q. Now, that morning when you reported did you report to the assistant superintendent or somebody like that to sign you in? A. No, sir.

72 Q. Didn't they give you any check or anything like that to identify you? A. No, sir.

Q. Did you—

The Deputy Commissioner (interposing): Is it admitted that the Travelers Insurance Company is also the insurance carrier for the employer in Bethesda?

Mr. Swingle: Oh, yes.

The Deputy Commissioner: And there is a record kept for the state employer in Washington, D. C. That is admitted?

Mr. Swingle: Yes.

The Deputy Commissioner: All right, you are excused.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon William F. Schultz was called as a witness for and in behalf of the claimant, and being then and there

duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Mr. Schultz, have you ever been employed by the Senn-Herrick Construction Company? A. Yes, sir.

73 Q. Where were you employed? A. The first time at the Mellon Art Gallery.

Q. You work there at the Mellon Art Gallery? A. Yes, sir.

* * * * *

Q. Then you worked at the Mellon Art Gallery job for some time, and then did you leave the employ of the Senn-Herrick Construction Company? A. I did, yes.

Q. And then were you employed by them again? A. Yes, sir.

Q. You were employed to go to work on what job? A. The Cancer Hospital in Bethesda.

Q. Who employed you to go to work for them there? A. Ralph Lenck.

Q. Ralph Lenck was the foreman? A. General Carpenter foreman.

* * * * *

76 Q. When you were working at Bethesda did you get any other job for the Senn-Herrick Construction Company? A. Yes, sir.

Q. Where did you go? A. To the Lafayette Building, Fifteenth and Eye Streets.

Q. Did you go right from the Bethesda job to the Lafayette Building? A. Everything had to be moved.

The Deputy Commissioner: That is in the District of Columbia?

The Witness: Yes.

By Mr. Wilson:

Q. Were you paid off when the Bethesda job was finished prior to starting work on the Lafayette Building? A. No, sir.

* * * * *

77 Q. Who employs you now? What is the name of the company? A. Stone and Webster.

Q. Are you the foreman? A. Yes, sir.

Q. When you tell a person to report to work, do you consider that you have hired him? A. He is hired.

* * * * *

Q. In your capacity as a foreman, I would like to ask you, if you told a man to report to work, when he reported and you refused to take him, could you just refuse to put him to work?

* * * * *

The Witness: No, sir.

* * * * *

78 Q. He is entitled to some compensation? A. He is entitled to pay.

Mr. Wilson: That is all.

Mr. Swingle: No questions.

Examination in Chief

By the Deputy Commissioner:

Q. When you finished working at Bethesda, Mr. Schultz, do I understand that without any order from anyone, you merely reported at the Lafayette Building in the District of Columbia? A. The same superintendent was to handle the job, and when I finished on Friday he said, "We will start the job on the Lafayette Building on Monday morning."

Q. Is that all he said to you? Did he ask you to go? A. He told me to go and naturally hired me as a foreman.

Q. But you had actually finished the work at the Bethesda job at that time? A. That is right.

Q. And your employer was just starting this work at the Lafayette Building in the District of Columbia? A. That is right.

* * * * *

79 Q. On mere job employment, you had not remained steadily with one employer, did you, as a rule? A. You have the privilege of quitting but the bigger the job was the longer you stayed, but you usually stayed with one employer until there was nothing for you to do.

The Deputy Commissioner: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon Willis A. Johnson was called as a witness for and in behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Wilson:

80 Q. What is your occupation, Mr. Johnson? A. Business representative for the Carpenters District Council, Washington, D. C., Alexandria, Virginia, and vicinity.

* * * * *

Q. Do the rules of the District Trade Council extend beyond the immediate boundaries of the District of Columbia? A. It takes in both Maryland and Virginia.

* * * * *

Q. Is it part of your job to see that carpenter contractors carry out the contract between the parties? A. That is right.

* * * * *

83 Q. Under this contract in which these rules are incorporated, who can hire carpenters? A. Well, that depends upon the nature of the job and how they are hired.

On some jobs the men are hired at the place of the job and on other jobs you call the office and they are hired through the office.

Q. Who has the power to do the actual hiring? A. The foreman on the job. He must be a member of the carpenters' organization.

Q. Can anyone else hire a man? A. Well, as far as we are concerned, I might say to the foreman, "How about putting these fellows to work?" and he can suggest who he would want to hire.

Q. Who has the power of hiring and firing? A. The foreman only.

Q. Now, do contractor (carpenter) foremen ever claim the right to ask that carpenters be sent out to any particular job on which there may be work? A. Practically every day.

Q. And when this man comes to work, can the foreman refuse to put him to work? A. If he does, he has to pay them two hours' showing up time.

* * * * *

84 Q. When is the pay day for the members of the Carpenters' Union? A. In most cases Friday; we specify that pay day must be once a week, and on almost every job the pay day is on a Friday.

* * * * *

Q. If a carpenter is discharged or laid off on one job, must he wait until Friday for his pay? A. No, sir; he must be paid immediately, or if he is given an order, what we call a money order—in other words, if they have
85 not got the cash on the job to pay for him, he is given an order to go to the office; if he is given an order and he must come a distance from the place of business, he must be allowed one hour's time to come from the job into town and get the order cashed.

Q. I would like to ask you, if a foreman asks a man to report to work, and he reports the next day, and the foreman does not put him to work, discharges him, do you in-

sist that he receive any compensation or not? A. If he is ordered by the foreman to come to the job, he must be paid showing up time.

Q. Would the same rule apply to both carpenters and foremen? A. That is right. The foreman is under the same jurisdiction from our organization as the workman is.

Mr. Wilson: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon Carl Dalquist was called as a witness for and in behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

86 Direct Examination

By Mr. Wilson:

Q. Have you ever been employed by the Senn-Herrick Construction Company? A. Yes, sir.

Q. As a carpenter? A. Yes, sir.

Q. When did you first go to work for them? A. The first time I worked for the Senn-Herrick Corporation was on the Mellon Art Gallery in 1938.

Q. You were employed then on the Mellon Art Gallery job in Washington, D. C., by the Senn-Herrick Construction Company? A. When I started on the—

Q. (Interposing) When you first started for the Senn-Herrick Construction Company? A. (Continuing) I was employed in the District.

Q. Were you employed by Senn-Herrick Construction Company on any other job? A. Yes, I worked in Bethesda.

* * * * *

Q. While you were working at Bethesda, for the Senn-Herrick Construction Company, did you also do some work for them on other jobs? A. Yes, I did.

87 Q. Where?

* * * * *

The Witness: I worked on the Mellon Art Gallery for a couple of weeks in the middle of the summer, 1939, and also in the fall, when we were called to [from] Bethesda to work on the Mellon Art Gallery.

By Mr. Wilson:

Q. You worked both in the District of Columbia and at Bethesda, Maryland, for the Senn-Herrick Construction Company? A. That is right.

Q. When you would report from one of these jobs to another, would you be paid off prior to reporting to the other; would you receive your pay? A. No, except the first time, when I was employed by another one. Two or three months between, but not the last; I mean, when I was sent from Bethesda to the Mellon Art Gallery I was not paid off.

Q. And you went from the Mellon Art Gallery back to Bethesda and you were paid off at the Mellon Art Gallery? A. No.

* * * * *

88 Q. When was the last time that you worked at Bethesda for the Senn-Herrick Construction Company? A. I can't tell you exactly what date it was; not even the month. September, I believe, last year.

Q. When you left work at the Bethesda job for the last time, where did you go? A. The Mellon Art Gallery.

Q. And you never returned to Bethesda? A. No, I did not return to Bethesda at all.

Q. Were you paid off at Bethesda when you left there the last time? A. No.

Q. You just remained continuously in the employ of the Senn-Herrick Construction Company from the Bethesda job to the Mellon Art Gallery? A. I finished up my work there.

* * * * *

90 Dewey Klotz was called as a witness for and in behalf of the claimant, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Have you ever worked for the Senn-Herrick Construction Corporation? A. Yes, sir.

91 Q. Where did you work for the Senn-Herrick Construction Corporation? A. The first time I went to work for them was on the Mellon Art Gallery and I worked in Bethesda, and I came back and I went to work at Fifteenth and Eye Street on the Lafayette Building.

* * * * *

Q. What was your job on the Senn-Herrick Construction Company? A. Labor foreman.

Q. Labor foreman? And in that capacity would you have anything to do with materials? A. Yes, sir.

Q. I would like to ask you, do you sometimes move materials from one job to another? That is, from the Mellon Art Gallery job to Bethesda and back? A. Yes.

* * * * *

92 Q. And they moved the material from the Mellon Art Gallery to Bethesda? A. Yes, sir.

* * * * *

Ralph Lenck was called as a witness for and in behalf of the respondent, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Swingle:

Q. Mr. Lenck, by whom are you employed now? -A. Senn-Herrick Construction Company.

* * * * *

93 Q. What is your employment with them now? A. Carpenter foreman of the Mellon Art Gallery.

Q. Is that the same position you had when you went to work, as I understand it, at Bethesda on the hospital job? A. Yes, sir.

* * * * *

Q. Do you remember a man named Mr. Gudmundson? A. Yes, sir.

Q. How long have you known him? A. I have known him for approximately three years.

Q. And where did you meet him? A. The first time at the Mellon Art Gallery.

Q. He came to work under you at that time? A. I hired him on that job as a carpenter.

* * * * *

95 Q. Well, where did you go then? A. I went out to Bethesda, Maryland, working for the Senn-Herrick Construction Company.

Q. How come you happen to go out there? A. I was supposed to go out and take charge of the job.

Q. Who called? A. Mr. Mack, the superintendent.

Q. Mr. who? A. Mr. Mack.

Q. Is he the man who usually calls people to go out on the job there? A. Yes, he is the superintendent on the job I have been working on, and I was in connection with him two or three times a month or once a week, and I saw him quite often.

Q. Does he do all the hiring out there or does the assistant superintendent sometimes do it? A. No; he hires the carpenter foremen, engineers, superintendents, and whatever he needs.

* * * * *

96 Q. How about the other men, laborers, carpenters, ironworkers; who hires them? A. The carpenter foreman hires his men and the labor foreman hires his men.

* * * * *

97 Q. With respect to Mr. Gudmundson, what hap-
 98 pened in his case? When did you first speak to him about
 anything out there? A. When I heard the McClos-
 key job was finished and I heard he was going to
 return from the job out in Bethesda, I asked Mr.
 Gudmundson if he would want to come to work for me when
 I went out there, and he said yes at that time.

Q. At that time you were working with your tools as a
 carpenter, the same as he was? A. Yes, sir.

Q. You were not working for the Senn-Herrick Construc-
 tion Corporation at that time? A. No, sir.

Q. Was the result of that conversation with Gudmundson
 later on that he came out to the job? A. No; I went out
 on the job the first day. The following evening I went out
 to Mr. Gudmundson's house and told him the work was
 ready to go on and would he like to come to work the fol-
 lowing morning.

Q. Did you go to the houses of any other men and ask
 them on that morning? A. Yes, I did.

Q. How many? A. One more.

Q. Since 1930 your employment with the Senn-Herrick
 Construction Company has been continuous, or has it not?

A. No.

99 Q. The Senn-Herrick Construction Company has
 jobs, I presume, in a good many different states,
 doesn't it? A. In Washington, that is the only place I
 know.

* * * * *

Cross-Examination

By Mr. Wilson:

Q. You were originally employed by the Senn-Herrick
 Construction Company in New York? A. Yes, sir.

Q. And you considered yourself on the regular pay roll?
 A. Yes, sir.

* * * * *

100 Q. Then, it is customary for you, is it not, to be regularly employed by the company when there is work, and when it is slack to go to work for another contractor for a while? A. If they want me to, yes.

Q. Now, this Mr. Mack, does he have any authority to hire carpenters on the job? A. He has no authority to hire carpenters; according to the union rules, that is all done through the carpenter foreman.

Q. When you go to a man's home and ask him to report to work, do you consider you have hired him to come to work? A. I consider him hired.

Q. It is not necessary before a man starts to work that he give his Social Security number and all this information, is it? Don't they sometimes start and then that is obtained that afternoon, maybe not at all, or a couple of days later? A. It is customary sometimes in that particular way.

Q. In your capacity as a foreman, could you hire anyone for a job any place you chose? You could go over to Maryland, Virginia, District of Columbia, and hire them to come to work? A. Yes, sir, for that particular job.

* * * * *

101 Q. When you told Mr. Gudmundson to come to work the next day, you considered him actually hired? A. I considered him hired.

Q. I understand that you can hire a man from any place to work on the particular job that you are working on. So you hired Mr. Gudmundson and he worked for you on this particular job because you were foreman on that job? A. Yes.

Q. You had no authority to ask him to work on any other job? A. No, sir.

* * * * *

103 Cross-Examination

* * * * *

Q. You testified that when you hire a man to work at Bethesda, you cannot tell him to report to any other place? A. No, I cannot.

Q. Did you order those men to report to the Mellon Art Gallery job to do some work for the Senn-Herrick Construction Corporation? A. After they were working for me I transferred them from one job to another.

104 Q. It is within your power to order them? A. Yes.

Q. Did you work for the Senn-Herrick Construction Company after that first job? A. From Bethesda I went out to Richmond, Virginia, and from Richmond I went to Columbia, South Carolina, and from there back to Fifteenth and Eye Street, Washington, D. C.

* * * * *

John C. Jackson was called as a witness for and in behalf of the respondent, and being then and there duly sworn by the Deputy Commissioner, assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Swingle:

Q. By whom are you employed now? A. The Senn-Herrick Construction Company.

Q. How long have you been employed by them?

105 A. I have been with them approximately four years.

Q. In what capacity are you employed? A. Assistant superintendent.

Q. You work in Washington for them or Maryland? A. In Washington.

* * * * *

106 Q. As to the circumstances of the employment of Mr. Gudmundson on that Bethesda, Maryland, job, can you tell us what you know about that? A. I don't know what you mean by that.

Q. Did you employ him yourself? A. I cannot say that I did. I may have seen him up on the job but I cannot swear to it.

Q. Somebody has to sign him up on the job; isn't that so? A. That is correct.

Q. What do you mean by signing them up on the job?

A. When they appear on the job, for instance, we may tell our foreman that we need carpenters on the job, and when the carpenter comes on the job in the morning at that particular time they bring with them their name, their
107 Social Security number, their address, and we also give them a working number.

* * * * *

Q. Who has the authority to actually hire the carpenters?

A. The superintendent on the job. He gives the foreman the authority to hire men or to tell the men to go to work. The superintendent will tell the foreman to have fifteen carpenters to start work at seven-thirty. I do not care how they come there, just so they are out there in the morning.

* * * * *

109 Q. Were you on the job when Mr. Gudmundson started to work? A. I think I was.

Q. You are positive? You don't know if Mr. Gudmundson was signed up to work or not? A. No.

* * * * *

111 By the Deputy Commissioner:

Q. Now, Mr. Jackson, would a foreman, a carpenter foreman, have a right to hire carpenters without any direction or authorization from the superintendent? A. I don't know; I wouldn't say so.

Q. Under no circumstances? A. That is a broad statement, under certain circumstances.

Q. If the superintendent gives him instructions to hire as many men as he needs—as a rule, what is the
112 practice of your company, now, in so far as hiring men is concerned? When you are a superintendent, do you always instruct your foremen to hire men, that is, the number of men that you want on the job, or do you tell the foreman to hire as many men as he thinks is necessary?
A. The number of men he thinks is necessary.

Q. The number of men that he thinks is necessary? A. That is right.

Q. You do not necessarily tell him to get fifteen men or to get ten men? A. No, not necessarily.

* * * * *

Q. How about in the case of firing? Would the foreman have the final decision to make in the case of firing
113 of carpenters? A. Not in all cases.

Q. Under what circumstances can he directly fire a carpenter without permission, without direction from the superintendent? A. He can do that.

Q. He can? A. Oh, yes.

Q. I believe you stated on direct examination that the employees are hired on the job rather than by the foreman? A. It does not necessarily mean that he is hired.

* * * * *

114 Q. Does the Senn-Herrick Construction Corporation have any regular employees, such as carpenters, any regular carpenters? A. Well, our carpenter foreman is perhaps what you would call a regular carpenter, and if we have no work and there is nothing to do, he will be laid off, just like anybody else would be. In fact, I myself would be laid off if we did not have enough work to warrant my working.

Q. Do you know whether the Senn-Herrick Construction Corporation was performing any work in Washington, D. C.? That is, at the time that Mr. Gudmundson was injured, which was May 25, 1939? A. They may have been doing some small piece of work on the Mellon Art Gallery. I cannot swear to it at the time.

The Deputy Commissioner: That is all.

Cross-Examination

By Mr. Wilson:

Q. Does the Senn-Herrick Construction Corporation in the District of Columbia abide by the agreement between the Master Builders Association. A. I believe so.

115 Q. In other words, they have worked as a union outfit? A. Oh, yes.
Mr. Wilson: That is all.

* * * * *

117 *Respondent's Exhibit No. 1*

State Industrial Accident Commission
741 Equitable Building, Baltimore, Md.
Employee's Claim For Compensation

* * * * *

118 Were you sent to hospital? Yes.
If so, name and address of hospital: Emergency Hospital, Washington, D. C. Where are you now? In the hospital.

* * * * *

128 *Respondent's Exhibit No. 6*
Senn-Herrick Corporation
Reinforced Concrete Construction

January 26, 1940

The Travelers Insurance Company
Washington Building
Washington, D. C.

Re: Edward Gudmundsen
S. S. No. 579-01-0016

Gentlemen:

The following is a transcript of the above claimant's payroll on the Mellon Art Gallery and National Institute of Health.

* * * * *

129 Very truly yours

SENN-HERRICK CORPORATION
By E. Cooper

130 P. S. This man has been working for us at the Lafayette Building, Washington, D. C., since the Week ending Jan. 10th, 1940, as follows:

Week end.	Jan 10, '40	\$24.00
" "	" 17,	35.25
" "	" 24,	24.00

* * * * *

126 *Respondent's Exhibit No. 5*

State Industrial Accident Commission

Equitable Building, Baltimore, Md.

January 25, 1940

The Travelers Insurance Company
Washington Building
Washington, D. C.

Claim No. 254912

Case of Everett Gudmundsen

Gentlemen:

Attention: Mr. Theodore Britton

We return the medical bills in connection with the above entitled case pro-rated as follows:

Evelyn J. Smith, R. N.	\$10.00	\$5.35
Mary P. Belfield, R. N.	5.00	2.68
Mavorean Lemmons, R. N.	5.00	2.68
Dr. Custis Lee Hall	20.00	10.70
Dr. J. Beaty Griffith.....	30.00	16.06
Central Dispensary & Emergency Hos- pital	377.10	201.85
Dr. Walter Atkinson	280.00	149.88
Dr. Joseph Kreiselman.....	20.00	10.70
Ideal Orthopedic Appliance Company...	45.00	24.09
Drs. Groover, Christie & Merritt.....	142.00	76.01
Total.....	\$934.10	\$500.00

127 We are now giving this case consideration for an award for permanent partial disability by giving the claimant an opportunity to request a hearing if he feels that he has sustained other permanent disability than the loss of vision of his left eye.

Very truly yours,

R. O. HARRISON
Director of Claim Division

ROH: W.

Appellant's Exhibit No. 1

139 Agreement

This agreement, entered into June 23, 1939, by and between the Master Builders' Association, hereinafter called the party of the first part, and the Carpenters' District Council, hereinafter called the party of the second part, both of Washington, D. C., Alexandria, Va., and vicinity.

8. The party of the second part agrees to furnish to the party of the first part copies of their By-Laws and Jurisdictional Claims, which are a part of this agreement in so far as they state in detail the conditions under which the party of the second part will be permitted to work.

12. This agreement shall be in effect from June 23, 1939, up to and including April 30, 1941.

Carpenters' District Council

John S. Flanagan

D. Quigley

F. E. Kettner

B. B. Blackburn

Witness: F. R. Howard

Master Builders' Association

James R. Skinker

C. W. Humphreys

P. Craig Jones

Witness: Frank J. Sheehan

* * * * *

*Appellant's Exhibit # 2*141 Constitution, By-Laws and Trade Rules of the
Carpenters' District Council

* * * * *

156 Hours of Labor

Article V

Section 1. Eight hours to constitute a day's work for the first five working days of the week, making a total of 40 hours per week. Time to be made between the hours of 7:30 A. M. and 4 P. M., and the men shall start
157 from the tool house at 7:30 A. M.,

* * * * *

159 Section 1. All foremen of carpenters shall be members of the United Brotherhood of Carpenters and Joiners of America.

Any member who receives or gives orders, directs or supervises work for his employer, shall be designated as a foreman.

* * * * *

174 Sec. 15. Any foreman or member sending out of town for men shall be fined as per Section 1, Article X. A foreman carpenter permitting any other than a member of the United Brotherhood to do any carpenter work on any job or in any shop shall be fined, upon conviction, as per Section 1, Article X.

Sec. 16. Any foreman or other member who attempts to hire or who pays a member less than the rate of wages that he is entitled to and should receive, or shall endeavor to have less than the established wage paid, or who shall induce any member to accept less than the es-
175 tablished wage or discharge a member for upholding the Trade Rules, shall, if found guilty, be fined as per Section 1, Article X, and ruled off the job and shop for six months.

* * * * *

178 Sec. 5. Contractors requiring members to work
in a locality where they do not return home daily
will be required to pay board and transportation.

Sec. 6. Any employer sending members from one job to
another shall allow time to move tools to new job.

* * * * * * * * *

179 Sec. 11. When a member under the jurisdiction
of the District Council of Washington, D. C., Alex-
180 andria, Va., and vicinity is dismissed he shall be
paid in cash or office order. Office order will entitle
him to the amount due and one hour additional time, and
must be honored when presented at office within one hour
from time of dismissal; otherwise waiting time shall be
charged. (This does not apply to a lay-off, which shall not
exceed eight working hours.) Men leaving of their own
accord must wait until regular pay day. Any member dis-
charged before starting time shall be allowed one hour's
pay.

BRIEF FOR EVERETT GUDMUNDSON, APPELLANT

IN THE United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APRIL TERM, 1941

FILED AUG 18 1941

No. 7851.

EVERETT M. GUDMUNDSON,

Appellant,

v.

FRANK A. CARDILLO, Deputy Commissioner, District of
Columbia Compensation District,

Appellee,

and

TRAVELERS' INSURANCE COMPANY,

Intervenor Appellee.

Appeal From Order and Judgment of the District Court
of the United States for the District of Columbia.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
ROBERT A. WILSON,
Counsel for Appellant,
736 Bowen Building,
Washington, D. C.



BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1941

No. 7851

EVERETT M. GUDMUNDSON,

Appellant,

v.

FRANK A. CARDILLO, Deputy Commissioner, District of
Columbia Compensation District,

Appellee,

and

TRAVELERS' INSURANCE COMPANY,

Intervenor Appellee.

**Appeal From Order and Judgment of the District Court of
the United States for the District of Columbia.**

**BRIEF FOR EVERETT M. GUDMUNDSON,
APPELLANT.**

Jurisdiction.

This is an appeal from a judgment of the District Court
of the United States for the District of Columbia, entered

on the 27th day of January, 1941, in the case of Everett M. Gudmundson, plaintiff, v. Frank A. Cardillo, Deputy Commissioner, District of Columbia Compensation District, defendant, and Travelers' Insurance Company, intervenor, Civil No. 7352, sustaining defendant's and intervenor's respective motions to dismiss, and dismissing plaintiff's amended complaint for mandatory injunction (Appellant's App. 17) which had been filed in the District Court pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, C. 509, 44 Stat. 1436 *et seq.* as amended U. S. C. Title 33 Sec. 901) made applicable to the District of Columbia by Act of May 17, 1928, 45 Stat. 600; Title 19, Chapt. 2, Section 11, District of Columbia Code. (Employees' Compensation Act.)

On February 13, 1941, appellant filed notice of appeal and perfected his appeal from the judgment of the Court below to this Court. (Appellant's App. 18.)

This Court has jurisdiction of this case under the Act of Congress approved February 9, 1893, 27 Stat. 435, Chapter 7, Section 7, as amended, Title 18, Chapter 2, Section 26 of the Code of Laws for the District of Columbia (1929).

Statement of the Case.

This case involves a claim for compensation (Appellant's App. 20), and the only issue is whether such claim comes within the jurisdiction of the District of Columbia workmen's compensation law. (Appellant's App. 25.)

Gudmundson, appellant here and plaintiff below, a resident of the District of Columbia for the last seven years, was employed in the District of Columbia on or about February 23, 1939, by the Senn Herrick Corporation, a New York construction company. (Appellant's App. 26, 28, 32.) It was contemplated that Gudmundson would work for that company on the construction of the National Institute of Health buildings (referred to herein as the Bethesda job)

at Bethesda, Maryland, and on the National Gallery of Art building (referred to herein as the Mellon Art Gallery job) in the District of Columbia.¹

On May 25, 1939, Gudmundson was severely injured at the Bethesda job during the course of his employment. The sight in one eye was destroyed; his back and wrist were broken and hearing impaired, in addition to more minor injuries. He was totally disabled from working for more than half a year. (Appellant's App. 21.)

Because of this injury some compensation was paid to Gudmundson under the Maryland Compensation Act by the Travelers' Insurance Company which insured the Senn Herrick Corporation for its liability under the compensation laws of both the District of Columbia and Maryland. (Appellant's App. 25, 23.)

On March 4, 1940, Gudmundson filed a claim for compensation under the provisions of Section 19 (33 U. S. C. A. 919) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 99 Stat. 1424) (hereinafter called the Longshoremen's Act) as made applicable to the District of Columbia (Act of May 17, 1928; 45 Stat. 600; Title 19, Chapter 2, Section 11, District of Columbia Code) to obtain compensation for this injury he sustained on May 25, 1939 at Bethesda, Maryland. (Appellant's App. 20.) The claim was controverted by his employer and its insurance carrier on the grounds that the District of Columbia workmen's compensation law did not apply to this claim. (Appellant's App. 24.)

After conducting a hearing, the Deputy Commissioner on May 22, 1940, made Findings of Fact and filed a compensation order rejecting appellant's claim for the reason that it did not come within the provisions of the District of

¹ Conclusions as to the place where the contract of hire was entered into and the location of the work contemplated by that contract are in dispute, but, as will be shown in our argument, (*infra* 18 *et seq.*) the uncontradicted evidence establishes those facts as stated herein.

Columbia workmen's compensation law. (Appellant's App. 25.)

Pursuant to Section 21b of the Longshoremen's Act (33 U. S. C. A. 921b), appellant filed a complaint for mandatory injunction in the District Court of the United States for the District of Columbia on June 18, 1940, in which he alleged that the compensation order rejecting his claim for compensation was not in accordance with law and was not supported by evidence. He prayed that the said order be set aside and the Deputy Commissioner compelled to take jurisdiction over his compensation claim. (Appellant's App. 1-3.)

The defendant, Deputy Commissioner, and intervenor, Travelers Insurance Company, appellees herein, filed motions to dismiss the complaint. (Appellant's App. 4, 7.)

On November 5, 1940, after hearing argument on the motions, the District Court, through Mr. Justice Bolitha J. Laws, filed a "Memorandum Sustaining Motions to Dismiss" in which the court stated that Gudmundson sought to have the court determine as a matter of law the jurisdiction of the Deputy Commissioner to pass upon his compensation claim, that, if the court could pass upon the question at all, it was by way of a trial *de novo*, and that the complaint was not properly drawn to present the question of the existence of a right to a trial *de novo*. (Appellant's App. 8-9.)

An order sustaining these motions to dismiss was filed on November 12, 1940. (Appellant's App. 10.)

A motion for leave to amend was granted (Appellant's App. 12) and an amended complaint for mandatory injunction was filed, which not only questioned the legal sufficiency of the evidence supporting the Deputy Commissioner's order, but also prayed for a trial *de novo*. (Appellant's App. 12-14.)

Defendant and intervenor filed motions to dismiss this amended complaint. (Appellant's App. 14-15.) On January 16, 1941, these motions came on to be heard before Justice T. Alan Goldsborough, who ruled that the plaintiff had no right to a trial *de novo* and then stated that there was substantial evidence in the record to support the Deputy Commissioner's findings and order² and that the complaint should be dismissed.

On January 27, 1941, an order was filed dismissing the amended complaint. This appeal is taken from that order. (Appellant's App. 17.)

Statutes Involved.

Title 19, Chapt. 2, Section 11 (Act of May 17, 1928, 45 Stat. 600, 612, Section 1) of the District of Columbia Code, called the Employees' Compensation Act, is involved in this case. It provides as follows:

That the provisions of Chapter 18 of Title 33 of the Code of the Laws of the United States, including all amendments that may be made thereto after May 17, 1928, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs, except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

² While it does not appear in the record, since no stenographic report was made of the court's proceedings, the court below apparently arrived at its conclusion concerning the sufficiency and character of the evidence without reading the record, as the court stated, during the proceedings, that it could tell from the oral argument that the record contained substantial evidence to support the Deputy Commissioner's findings and order.

This is called to the Court's attention only to prevent the Court from obtaining the impression that as a certainty the lower court's ruling was based upon a reading of the record.

Statement of Points.

(1) The court erred in denying the prayer of the plaintiff for a trial *de novo* and erred in failing to reweigh the evidence adduced at the hearing before the said Deputy Commissioner.

(2) The court erred in sustaining the motions of defendant Frank A. Cardillo, Deputy Commissioner, and intervenor Travelers' Insurance Company, to dismiss the amended complaint for mandatory injunction and in rendering judgment for said defendant and said intervenor on the grounds that appellant's claim for compensation was not within the jurisdiction of the District of Columbia workmen's compensation law.

(3) The court erred in rendering judgment for said defendant and said intervenor, because the findings of fact and compensation order of said Deputy Commissioner rejecting plaintiff's claim for compensation and the judgment of the court sustaining said compensation order are not supported by any evidence and are contrary to the uncontradicted evidence and, therefore, are not in accordance with law.

Summary of Argument.

I.

The court erred in denying the prayer of appellant for a trial *de novo* and in failing to reweigh the evidence adduced at the hearing before the Deputy Commissioner.

(A) The only question involved in the instant case is one of the jurisdiction of the Deputy Commissioner over appellant's claim. Findings of fact of the Deputy Commissioner are not binding on the court. *Crowell v. Benson*, 285 U. S. 22.

The case of *Crowell v. Benson* (*supra*), is applicable in the instant case for the question before the court concerns the jurisdiction of Congress over the District of Columbia, and not a question of Congress' governmental administration of the District of Columbia.

(B) Since none of the parties in the case desired to introduce any additional evidence to that contained in the record made before the Deputy Commissioner, it was not necessary for the court to conduct an actual trial to determine the facts of the case, but the court could reweigh the evidence contained in the record and determine the facts. *Georgia Casualty Co. v. Hoage*, 61 App. D. C. 195, 59 F. (2d) 870.

(C) However, since appellant contends also that the findings of the Deputy Commissioner are not supported by substantial evidence, if this court agrees with that contention, it is not necessary to pass on the question of appellant's right to a trial *de novo* because the same result would then be reached, namely, that the Deputy Commissioner's compensation order should be set aside.

II.

The compensation order rejecting appellant's claim should be set aside and the Deputy Commissioner ordered to take jurisdiction over appellant's claim.

(A) The basic facts of the case are not in dispute, but only the conclusions to be drawn from them.

(1) The evidence clearly establishes that the appellant's contract of hire was entered into in the District of Columbia.

(2) Under this contract of hire, the appellant's work was not to be performed entirely on one construction project at Bethesda, Maryland, but that he was hired for as long a period as mutually agreeable to the

parties, and that under this contract of hire appellant actually worked in the District of Columbia at the Mellon Art Gallery job, which the Senn-Herrick Corporation was constructing in unison with the Public Health Center job in Bethesda, Maryland.

(B) Had the only employment of the Senn-Herrick Corporation been the entering into the contract of hire in the District of Columbia, appellant's claim would be within the jurisdiction of the District of Columbia Compensation Act.

That act imposes a liability on *every* employer who carries on *any employment* in the District of Columbia to insure his employees under the District of Columbia Act. The District of Columbia, having a public interest in appellant, could and did attach this liability upon the Senn-Herrick Corporation as a consequence of its acts of securing appellant's services in the District of Columbia.

(C) Even in the absence of the broad extraterritorial provision of the District of Columbia Compensation Act, since the contract of hire was entered into in the District of Columbia, the *lex loci contractus* governs the rights of the parties as established by an overwhelming weight of authority throughout the country.

The decisions of the State of New York as to the extraterritorial effect of its act are not applicable in the District of Columbia because there is no extraterritorial provision in the New York act, and the great difference between the economic and territorial composition of the State of New York and the District of Columbia makes an interpretation of its act in this regard inappropriate for local conditions.

(D) Since the Senn-Herrick Corporation was actually carrying on employment in the District of Columbia at the time appellant was injured, the case of *Moyer v. Cardillo*, 119 F. (2d) 785, is controlling in the instant case.

(E) The gist of the United States Supreme Court cases involving the extraterritorial effect of workmen's compensation acts is that the place of injury is of no concern but that the act of the sovereignty which has the greatest public interest in the injured workman should prevail. Since the District of Columbia has a great interest in appellant, while that of Maryland is nil, the local act should apply.

(F) The fact that appellant received some compensation under the Maryland law does not affect his claim. Courts have held, practically unanimously, that claims are not barred by recovery under another act. Also, the District of Columbia Act has specific provisions which protect an injured employee from having his compensation claim barred by recovering in a manner other than that prescribed in the act.

ARGUMENT.

I.

The Court erred in denying the prayer of the appellant for a trial de novo and erred in failing to reweigh the evidence adduced at the hearing before the Deputy Commissioner.

(A) Appellant had a right to have the court below conduct a trial de novo to determine the fact in the case.

The starting point of appellant's argument under the first statement of points is the case of *Crowell v. Benson*, 285 U. S. 22; 52 S. Ct. 285; 76 L. Ed. 598.

In that case the Supreme Court held that a deputy commissioner's findings concerning *jurisdictional facts* are not binding and that therefore it is not error for a District Court to conduct a trial *de novo* to determine a jurisdictional fact.

The fact that the case of *Crowell v. Benson (supra)* arose under the Longshoremen's and Harbor Workers' Compensation Act, while the instant case arose under that Act as adopted for the District of Columbia, does not make it inapplicable in the instant case.

The fundamental basis of the decision in the case of *Crowell v. Benson (supra)*, is that under the Constitution Congress has jurisdiction over certain matters and certain territory, while the judiciary is empowered to determine the extent of that Congressional jurisdiction. Therefore, while Congress, in the exercise of its legislative jurisdiction, can empower an agency to make findings of facts concerning matters *within the scope* of its authority, Congress cannot authorize such an agency to make findings concerning the *extent* of its jurisdiction, for by so doing, Congress would be authorizing its own agent to make determinations of the extent of the jurisdiction of Congress itself.

Thus, the court held in *Crowell v. Benson (supra)*, that there were two jurisdictional facts, fundamental to the operation of the Longshoremen's Compensation Act, that could not be determined with finality by a deputy commissioner. One was the existence of an employer-employee relationship; the other that the injury occur upon the navigable waters.

The existence of an employer-employee relationship is not involved in the instant case, so a discussion of that point will not be made beyond the simple explanation that, obviously, it would be beyond the powers of Congress to attach liability without fault to an individual for an injury of a stranger.

The second jurisdictional question, that is, whether the injury occurred upon the navigable waters, cannot be determined with finality by a deputy commissioner, for the Con-

gressional power to enact the Longshoremen's Act is based upon the Federal government's jurisdiction over navigable waters. To permit a deputy commissioner, an agent of Congress, to find facts with finality concerning this fundamental requirement, upon which the jurisdiction of Congress itself is based, would be to usurp the judicial power and permit Congress to determine for itself the extent of its jurisdiction through its agents.

As expressed in the language of the decision (*Crowell v. Benson* (*supra*), 285 U. S. at page 57) :

"The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, * * *."

And, on page 54 of 285 U. S.:

"These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because Congress has so provided explicitly (Section 3) *but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.*

"In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. *Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.* Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that

is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute." (Emphasis ours.)

In the instant case, just as a deputy commissioner under the Longshoremen's Act cannot make conclusive findings concerning the question of whether an injury occurred upon the navigable waters, so a deputy commissioner under the Employees' Compensation Act cannot make conclusive findings concerning the question of whether an employer was carrying on any employment within the District of Columbia. The power of Congress to enact the Employees' Compensation Act was as dependent upon its jurisdiction over the District of Columbia as its power to enact the Longshoremen's Act was dependent upon Congress' jurisdiction over navigable waters.

The question of appellant's right to a trial *de novo* is not a matter of first impression in the District of Columbia. See *Metropolitan Casualty Ins. Co. of New York v. Hoage*, 63 App. D. C. 307, 72 F(2) 175; *Standard Accident Ins. Co. v. Hoage*, 62 App. D. C. 245, 66 F (2) 275; and *Georgia Casualty Co. v. Hoage*, 61 App. D. C. 195, 59 F (2) 870.

In the case of *Metropolitan Casualty Ins. Co. v. Hoage*, (*supra*), involving a claim under the Employees' Compensation Act, this court stated:

"The lower court granted a trial *de novo*, and at the conclusion of the trial made certain findings of fact and filed certain conclusions of law, all of which are copied into the record.

"(1) There is no dispute as to the cause of Brown's death. The question before us is solely the fact of employment, and, as this fact is an essential condition precedent to the right to make the claim, the proceeding in the court below was, in our opinion, entirely proper. *Crowell v. Benson*, 285 U. S. 22, 62, 52 St. Ct. 285, 76 L. Ed. 598." (Emphasis supplied.)

Certainly, this language constitutes sufficient precedent to establish appellant's right to a trial *de novo* and should have been controlling in the court below:

- (B) It is proper for the court to re-weigh the evidence contained in the record made before the Deputy Commissioner to determine the facts involved in the case.**

Though the appellant had a right to have the court below conduct a trial to determine the facts upon which his compensation claim was predicated, he could submit his case to that court on the record made before the Deputy Commissioner.

In the instant case, to conduct an actual trial to determine the facts would have involved considerable delay, and the appellant would have been faced with uncertainty and difficulty in again obtaining his witnesses, some of whom had moved from the vicinity of the District of Columbia. Furthermore, the record made before the Deputy Commissioner contained all the evidence the parties desired to submit in the case³, so a record made before the court would have been repetitious to a large extent.

However, the appellant did not wish the court to examine that record merely to see if it contained a legal sufficiency of evidence to support the Deputy Commissioner's findings. Appellant desired the court to re-weigh the evidence and determine for itself the facts involved in the case⁴.

³ Counsel for each party stated in open court that he had no desire to present any materially different or further evidence than that contained in the record made before the Deputy Commissioner.

⁴ It was only to conform to Justice Law's memorandum opinion that the appellant amended his complaint to include a prayer for a trial *de novo*. The pleadings and the prayers of the original complaint were left virtually unchanged in the amended complaint. Although Justice Law's holding, that only through an actual trial, specifically prayed for, could the court consider the appellant's case, was clearly erroneous in view of the fact this court has held otherwise (*Georgia Casualty Co. v. Hoage*, (*supra*) *Standard Accident Insurance Co. v. Hoage* (*supra*), and that the complaint in the case of *Crowell v. Benson* (the case upon which Justice Law's memorandum opinion was based) contained no prayer for a trial *de novo* (Supreme Court Records Vol. 12, Cases No. 19 & 20, Transcription of Records and File Copies of Briefs 1931) no appeal was taken as it would involve expense and delay without presenting the case to this court upon its merits.

When the appellant's case was presented to the court below it was the duty of that court to determine the facts involved in the case independently of the Deputy Commissioner's findings. And this determination could be made either through a trial *de novo* or upon the record made before the Deputy Commissioner which was presented to the court as the evidence in the case. (Appellant's App. 4.)

This is clearly expressed in the case of *Georgia Casualty Co. v. Hoage (supra)*, which was a compensation case involving only a question of the existence of an employer-employee relationship. This court stated in its decision that:

"* * * no request was made of the lower court for a trial *de novo*, nor was any new evidence offered on behalf of the carrier. *The court below was asked to consider the question on the evidence adduced before the Deputy Commissioner, and did so * * *.*" (Emphasis ours.)

"* * * and this involves *our determining on the record before us* whether the award made by the Deputy Commissioner was contrary to law, for the reason that deceased at the time of his injury was a partner and not an employee, and his claim, therefore, not within the jurisdiction of the Deputy Commissioner." (Emphasis ours.)

* * * * *

And there can be no doubt that this court then proceeded to re-weigh the evidence contained in the record, as it stated:

"* * * we are constrained to think the *greater weight of the evidence* sustains the conclusion that Raines at the time he came to his death was an employee and not a partner." (Emphasis ours.)

The court concluded by recognizing that whether a trial *de novo* was requested and conducted or not the findings of a Deputy Commissioner concerning his own jurisdiction

cannot be final nor conclusive but such facts must be determined by the court. As stated in the decision:

"In the *Crowell v. Benson* Case, *supra*, the Supreme Court held the fact of employment an essential condition precedent to the right to make the claim, and the determination of the Deputy Commissioner as to this neither final nor conclusive. The result of this is to leave to the trial court the determination of the existence of this fact, which, the Supreme Court says, is fundamental."

(See also *Standard Accident Co. v. Hoage*, (*supra*).)

- (C) **The compensation order is not supported by substantial evidence, therefore, it is not necessary for the court to pass upon the question of whether the Deputy Commissioner's findings are binding on the court.**

Regardless of the questions of appellant's right to a trial *de novo* and whether or not the weight of the evidence is against the Deputy Commissioner's findings and order, it is too well established to merit discussion that a compensation order not supported by substantial evidence contained in the record made before a Deputy Commissioner is not in accordance with law and should be set aside⁵. (*Burris v. Hoage*, 61 App. D. C. 228, 59 F. (2) 1042; *Powell v. Hoage*, 61 App. D. C. 99, 57 F. (2) 766; *Crowell v. Benson* (*supra*).) And, also, a claim for compensation *in the absence of substantial evidence to the contrary* comes within the provisions of the Employees Compensation Act. (See Section 20(a) of the Longshoremen's Act; Section 920(a) U. S. C. Tit. 33; 33 U. S. C. A. 920(a). See also *Taylor v. McManigal*, 89 F. (2) 583, 585.)

Therefore, in the instant case, if the record made before the Deputy Commissioner does not contain substantial

⁵ An order rejecting a compensation claim is a compensation order within the terms of Section 21(b) of the Longshoremen's Act. (Section 921 (b) U. S. C. Tit. 33; U. S. C. A. 921(b).) *Crescent Wharf & Warehouse Co. v. Pillsbury*, 93 F. (2) 761, Cert. Den. 58 S. Ct. 1038. (See, also, Section 19(e) of the Longshoremen's Act.)

evidence to support the Deputy Commissioner's order, as is alleged in the complaint (Appellant's App. 14), it is not necessary for this court to pass upon the question of appellant's right to have the facts of the case determined by the court independently of the Deputy Commissioner's findings.

This is so because, as was pointed out heretofore, any record made at a trial *de novo* would be in all material aspects identical to the one made before the Deputy Commissioner, and, therefore, all the evidence in the case is before the court by the parties' stipulation making the record part of the complaint. (Appellant's App. 14.) If this record does not contain substantial evidence to support the Deputy Commissioner then it follows that whether a trial *de novo* is conducted, or whether the court re-weighs the evidence contained in the record made before the Deputy Commissioner, or whether the court merely examines that record to ascertain if it contains substantial evidence to support the Deputy Commissioner's findings, the same legal conclusions would necessarily result, namely, that the compensation order is not supported by substantial evidence and is, therefore, not in accordance with law and should be set aside.

While this situation may be unusual, it is not novel.

In the case of *Taylor, et al. v. McManigal, et al.*, (*supra*), the question before the court was whether one Watkins (deceased) was a member of a crew or not.

In passing upon the question of whether a trial *de novo* should have been conducted or whether the court should examine the record merely to ascertain if it contained substantial evidence to support the Deputy Commissioner, the court stated:

"We are relieved from determining which procedure should have been adopted because the court, after using each of them, came to the same conclusion. The

only evidence was that submitted to the Deputy Commissioner. The court not only found that there was substantial evidence to sustain the findings of the Commissioner, but that the weight of the evidence was that Watkins was not a member of the crew. If the latter finding was correct, so was the first and the decree should be sustained." (Emphasis supplied.)

See also, *South Chicago Coal & Dock Co. v. Bassett*, 104 F. (2) 522⁶.

We contend that the foregoing discussion and precedents completely support our contention that because the only question involved in the case is one of law, the findings of fact of the deputy commissioner are not binding, and that, therefore, it was error for the court below to deny appellant's prayer for a trial *de novo*, or, in the alternative, reweigh the evidence adduced at the hearing before the deputy commissioner.

It is but natural that the appellant is anxious, if possible, to prevail in this court on the merits of his claim rather than on the procedural errors of the court below, for to prevail only in the latter would result in the principal issue of the case remaining undecided and left to arise again, a situation not favored by this Court. (*Green v. Obergfell*, decided March 17, 1941.) For that reason the remaining portions of this brief shall discuss the question of whether the necessary evidence is contained in the record made before the Deputy Commissioner to support his findings of fact and compensation order.

⁶ The basis of that decision on the question of whether a jurisdictional fact was involved, as affirmed by the Supreme Court, (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251), is that Congress has jurisdiction over both longshoremen and members of a crew while employed upon the navigable waters and, therefore, could classify to which group the act might apply. Since Congress has jurisdiction over crew members, as well as longshoremen, while working on navigable waters, the question of whether a claimant was a member of a crew is not a jurisdictional one.

II

The compensation order rejecting appellant's compensation claim should be set aside and the Deputy Commissioner ordered to take jurisdiction of the said compensation claim.

(A) The basic facts of the case are not in dispute; only the conclusions to be drawn from the facts are in controversy.

The basic facts involved in the case are not in dispute and, though the following may be repetitious to some extent of the statement of the case, it is expressive of the undisputed facts in the case.

The appellant has been a resident of the District of Columbia for the past seven years. (Appellant's App. 26.) He is a carpenter by trade and a member of the Carpenters' District Council for Washington, D. C., and vicinity, affiliated with the Brotherhood of Carpenters and Joiners of America. (Appellant's App. 26, 37.)

His employer at the time of his injury was the Senn-Herrick Corporation, (Appellant's App. 23) (hereinafter sometimes called the company) a construction company incorporated and having its main offices in the State of New York. (Appellant's App. 24.) While this company had no offices in the District of Columbia other than temporary offices located at the project where it was employed (Appellant's App. 24), it did carry on construction work in the District of Columbia, having done work on the construction of the Mellon Art Gallery on Constitution Avenue, and on the Lafayette Building at 15th and Eye Streets. (Appellant's App. 24, 35, 43.)

This company operated as a union contractor and therefore, when performing work in the District of Columbia or vicinity, was a party to a union contract between the

Master Builders and the Carpenters' District Council. (Appellant's App. 37, 47, 48, 50.)

Appellant first went to work for this company some time in February of 1938 on the construction of the Mellon Art Gallery in the District of Columbia (Appellant's App. 30) where the company was employed as a subcontractor to do certain carpenter work in the construction of that building. (Appellant's App. 34.) After a time the carpenter work on the building so progressed that it became necessary to delay that work until certain other portions of the construction work had advanced. (Appellant's App. 26, 31, 34.) Because of this situation at the Mellon Art Gallery, the company laid off its carpenters and its carpenter foreman employed on this project, although much carpenter work remained to be performed at some future date. (Appellant's App. 31-32.)

After being laid off by the company both Gudmundson and Ralph Lenck (referred to in some places in the record as Link) who was regularly employed as the company's carpenter foreman and who had been Gudmundson's foreman at the Mellon Art Gallery job, went to work for the McCloskey Company on a construction job in the District of Columbia, and there they worked with their tools alongside of each other. (Appellant's App. 31, 43.)

While Gudmundson and Lenck were working for McCloskey Construction Company, Lenck was notified by the Senn-Herrick Corporation that it had obtained a contract to perform certain work on the construction of the Public Health Center in Bethesda, Maryland, and that he, Lenck, was to be the carpenter foreman on that project when the work began. (Appellant's App. 42.)

After receiving this information, but while still working as a carpenter for McCloskey Co., Lenck asked Gudmund-

son if he would like to return to work with the Senn-Herrick Corporation when carpenter work was ready at the Bethesda job. (Appellant's App. 31, 32, 43.) The amount of carpenter work that the company would have available at both the Bethesda job and at the Mellon Art Gallery job, with the resulting probability of a long period of employment, was specifically discussed by these two men. (Appellant's App. 32, 43.) Gudmundson expressed a willingness to return to work for the company as soon as work was ready. (Appellant's App. 27.)

Subsequent to the time this conversation between Lenck and Gudmundson took place, Lenck terminated his employment with McCloskey Company and returned to work with the Senn-Herrick Corporation as a carpenter foreman. (Appellant's App. 31, 32.) About two weeks later, on the evening of February 23, 1939, Lenck went to appellant Gudmundson's home in the District of Columbia, told Gudmundson he was ready for him and asked Gudmundson to report, ready for work, at the Bethesda job the next morning. (Appellant's App. 30, 32.) As a result of this conversation, Gudmundson obtained his tools from the McCloskey job early the next morning, went out to the Bethesda job and began working there for the Senn-Herrick Corporation at 7:30 o'clock a. m., the starting time for a carpenter under the rules and regulations of the Carpenters' District Trade Council. (Appellant's App. 32, 33.)

Gudmundson continued to work for Senn-Herrick Corporation until the time of his injury on May 25, 1939 (Appellant's App. 33), and returned to work for that company at the Lafayette Building in the District of Columbia after he recovered. (Appellant's App. 49, 21.) Although most of appellant's work until the time of his injury was performed on the construction of the Bethesda job, one day, prior to his injury, he was sent by Lenck to do some work

at the Mellon Art Gallery job in the District of Columbia. (Appellant's App. 28, 29, 45.)

On May 25, 1939, Gudmundson was severely injured at the Bethesda job. He was taken to the Emergency Hospital, in the District of Columbia, where he remained in a critical condition for a long period of time. (Appellant's App. 21, 22.)

Gudmundson was paid some compensation under the provisions of the Compensation Act of the State of Maryland. (Appellant's App. 25.)

While the foregoing facts are not in dispute, the conclusions to be drawn from them are in controversy.⁷

It is the appellant's contention that the proper conclusions to be drawn from these facts are that the contract of hire was entered into in the District of Columbia, that the tenure of the employment was to be governed by the will of the parties, that the contract especially contemplated that the appellant would work for the Senn-Herrick Corporation on the Mellon Art Gallery job in Washington, D. C., as well as on the Bethesda job; that the Senn-Herrick Corporation was engaged in construction work at the Mellon Art Gallery job in the District of Columbia contemporaneously and in unison with the Bethesda job; that the fact that the appellant received some compensation under the Maryland Compensation Act does not affect in any way his compensation claim under the District of

⁷ This court has held in *Burris v. Hoage*, (*supra*):

"It is first insisted that both the lower court and ourselves are bound by the findings of fact of the deputy commissioner, but it is sufficient to say as to this that we have many times held that, upon a review of the record made before the deputy commissioner, our duty is to determine whether his order was or was not in accordance with law, and this depends upon whether the testimony taken before the deputy commissioner will sustain his finding. In this case the facts are all agreed, and the difference between the deputy commissioner and the court is to the conclusion to be reached from the admitted fact." (See also *Moyer v. Cardillo*, 119 F. (2) 787, decided February 24, 1941.)

Columbia Act; and that therefore the District of Columbia Compensation Act is applicable to appellant's injury.

1. The contract of hire was entered into in the District of Columbia.

The first pertinent question in determining the place where the contract of hire was entered into is whether Lenck, the carpenter foreman, had the authority to hire the appellant when he went to appellant's home and asked him to report for work.

The record is replete with evidence that carpenter foremen in general, and in the instant case Lenck in particular, have authority to hire carpenters.

Schultz, appearing as a witness for the appellant, testified that he had been employed to work for the Senn-Herrick Corporation by Lenck, the carpenter foreman. (Appellant's App. 35.) Schultz, who at the time of the hearing was employed as a carpenter foreman (Appellant's App. 36), testified that when he, in his capacity of a carpenter foreman tells a man to report for work, that man is hired. (Appellant's App. 36.)

Johnson, the Business Representative of the Carpenters Union, testified that *only* carpenter foremen have the right to hire carpenters (Appellant's App. 38.)

The by-laws of the Union which the Senn-Herrick Corporation had agreed to abide by (Appellant's App. 48, 50) show conclusively that carpenter foremen have the authority to hire, and do the actual hiring of carpenters for their employers. (Appellant's App. 51-52.)

It is particularly interesting to note the testimony of the defendant's own witnesses in regard to the question of a carpenter foreman's authority to hire carpenters.

Lenck, the Senn-Herrick Corporation's carpenter foreman, a witness for the defendant, testified that he had

hired the appellant (Appellant's App. 44), that only carpenter foremen have the authority to hire carpenters (Appellant's App. 44), and that though superintendents hire carpenter foremen, the carpenter foremen hire their own men. (Appellant's App. 42).

The defendants' principal witness, Jackson, an assistant superintendent employed by the company testified that the carpenter foremen not only are given the authority to hire carpenters, but have the responsibility of obtaining carpenters and determining the number that are needed. (Appellant's App. 46-47.)

It is thus evident that Lenck, in his capacity as the carpenter foreman for the Senn-Herrick Corporation had the authority to hire the appellant when he went to the appellant's home and requested appellant to report for work.

It is an elementary and primary principal of contract law that a contract is entered into at the place where the last act was done by either of the parties essential to a meeting of the minds. (*Clark v. Belt*, 123 Fed. 572, CCA 8th.) In the instant case the minds of Gudmundson and his employer, the Senn-Herrick Corporation, through its authorized agent Lenck, met in the District of Columbia at the appellant's home when Lenck asked the appellant to report for work and the appellant agreed to do so. Because of their prior employment relationship, and because of the existing contract between the Carpenters Union and the employer each of the parties knew the wages, starting time, and all the other conditions of the contract of hire contemplated in the mind of the other. The contract of hire thus came into being at the appellant's home in the District of Columbia the evening before he reported for work.

Any contention that some further act, such as signing up for work, was necessary before the contract of hire could come into being is not tenable, and there is absolutely no evidence in the record to that effect.

Jackson did make some statement that would give the impression that it was necessary for a carpenter to be "signed up" before he could be hired, but that statement is not evidence that such "signing up" is actually necessary before a contract of hire can be entered into, and, further, it is nothing more than a conclusion of the witness and is not concerned with the actual facts. (Appellant's App. 45.)⁸

Lenck testified that such information as Jackson referred to is often not obtained until the employee has actually been working for some time (Appellant's App. 44), and further, Jackson himself testified on cross-examination that he did not know if Gudmundson had been "signed up". (Appellant's App. 46.)

But, be that as it may, the record is perfectly clear that Gudmundson was not "signed up", nor did he report to anyone other than Lenck prior to beginning work at the Bethesda job. (See Appellant's App. 29, 34.)

While the record as a whole, and in particular the foregoing excerpts of testimony from it, establish beyond any conceivable doubt that the contract of hire between Gudmundson and the company was entered into in the District of Columbia⁹ the court's attention is invited to decisions of other jurisdictions in analogous situations.

⁸ Of course it is not contended that records of employees are not required by the employer for bookkeeping or some other purposes, but there is no evidence, nor does it seem reasonable, that the submission of such information for the records of the company is a necessary condition precedent to the contract of hire's coming into existence.

⁹ It should be noted that the Carpenters' District Council has taken cognizance of the fact that men are hired prior to the beginning of work and discharged before starting time. In such instances wages must be paid. (Appellant's App. 52.) Had appellant not been put to work the morning after Lenck hired him, he would have received pay. (Appellant's App. 36, 38.)

See *Globe Cotton Mills v. Industrial Accident Commission of California*, 64 Calif. App. 307, 221 Pac. 658.

Chicago, R. I. & R. Ry. Co. v. Lundquist, 206 Iowa, 499, 221 N. W. 228.

Benquet Consolidated Mining Co. v. Ind. Acc. Com., 36 Calif. App. (2), 97 P. (2) 267.

2. The appellant was employed for as long a period as was mutually agreeable to the parties.

The appellant testified that he considered that he was being employed by the Company generally and not to work only on the Bethesda job. (Appellant's App. 29.)

However, the record contains no statement of the company expressing its intentions concerning the tenure of employment contemplated in the contract of hire, but it is clearly established that the company had no intention of discharging appellant upon the completion of the Bethesda job if other work was available as it did not discharge its carpenters in its employ but continued their employment on other projects when the Bethesda job was completed.

Schultz, employed by the company, testified that upon the completion of the Bethesda job he was transferred by the company to work on the construction of the LaFayette Building in the District of Columbia, with no intervening period other than the ordinary weekend. (Appellant's App. 35, 36.)

Dalquist testified that as an employee of the Senn-Herrick Corporation he worked on the construction of the Bethesda job, and upon the completion of his work for the company on that job continued in the employ of the company on the Mellon Art Gallery job without any intervening lay-off. (Appellant's App. 40.) He further testified that he was

not "paid off" when he last left the Public Health Center job.¹⁰ (Appellant's App. 40.)

In addition to the record showing that the company continued carpenters in its employ upon the completion of its work on the Bethesda job it is established by the record that appellant, when able to return to work, was employed by the Senn-Herrick Corporation, (Appellant's App. 21 and 49), indicating that his services were desired if work was available.

The very nature of construction work forces discontinuous and irregular employment to a large extent, but it does not follow that carpenters are therefore employed only from job to job.¹¹ The record establishes that superintendents and foremen of construction companies are also laid off when no work is available. (Appellant's App. 47.) Naturally, when a construction company has no work available upon the completion of a construction project, employment is discontinued, just as a lack of work will bring about unemployment in any field, whether it be construction work or any other enterprise.

3. The contract of hire contemplated that appellant would work at both the Public Health Center job and the Mellon Art Gallery job.

The fact that it was especially contemplated in the contract of hire that the appellant would work for the company on the Mellon Art Gallery job as well as the Bethesda job

¹⁰ The rules of the Carpenters Union were made part of the agreement between the Senn-Herrick Corporation and the Union (Appellant's App. 50). These rules provide that a carpenter shall be paid immediately when his employment is terminated if not terminated at the employee's own accord. (Appellant's App. 52.) It follows that if a carpenter is not paid off, his employment is not terminated. (See also testimony of Johnson, Appellant's App. 38.)

¹¹ The rules and by-laws of the Carpenters' District Council refute the finding that carpenter's employment is limited to one construction job as they contemplate and provide for the transfer of men from one job to another. (Appellant's App. 52.)

is so clearly established by the record that no detailed discussion of the evidence is felt necessary.

The appellant testified that when his original employment by the Senn-Herrick Corporation was terminated he knew that that company had carpenter work remaining to be done on the Mellon Art Gallery job (Appellant's App. 26, 31, 34); that he knew it might be necessary for the company to send some carpenters from the Bethesda job to the Mellon Art Gallery job (Appellant's App. 28) and *that the prospects of long employment because of these two contemporary construction projects was an inducement to leave his employment with the McCloskey Construction Company and return to work with the Senn-Herrick Corporation.* (Appellant's App. 28, 32.)

However, the record does not only establish that it was contemplated in the contract of hire that the appellant would work for the company at both the Bethesda job and the Mellon Art Gallery job, but that the appellant actually did work at both jobs. (Appellant's App. 28-29; 33.)

4. **The Senn-Herrick Corporation carried on construction work at the Mellon Art Gallery job, contemporaneously and in unison with construction work at the Public Health Center job.**

Though the Deputy Commissioner found "that at the time of the injury no employment existed in the District of Columbia" (Appellant's App. 25), such is not the fact in this case. The record abounds with evidence establishing that at the time the company was engaged in construction work at the Bethesda job, it was also engaged in construction work on the Mellon Art Gallery job in the District of Columbia, and that the company handled these two jobs in unison, transferring men and materials from one to the other.

While the testimony to which we have heretofore directed the court's attention, (particularly in the absence of any evidence to the contrary), would seem to be sufficient to establish that the company was performing work in the District of Columbia at the same time it was engaged in construction work at Bethesda, Maryland, this fact is definitely and conclusively established by a wealth of evidence introduced into the record for the sole purpose of establishing this fact.

The testimony of Dalquist, a carpenter, establishes that he was on several occasions transferred between the Bethesda and the Mellon Art Gallery jobs. (Appellant's App. 39-40.) And Lenck, the carpenter foreman, testified that while ordinarily he could not transfer men from one job to another, he did transfer men between the Bethesda job and the Mellon Art Gallery job. (Appellant's App. 44-45.)

The testimony of Klotz, the Senn-Herrick Corporation's labor foreman, shows that not only were carpenter employees transferred from one to another of these jobs, but that the company constantly moved material from one to the other. (Appellant's App. 41.)

And it was established that this work the company was performing on the Mellon Art Gallery job, had not been completed at the time of the appellant's injury, nor, indeed, had it been completed at the time of the hearing. (Appellant's App. 34.)

Further, it was admitted by the appellee, Travelers' Insurance Company, that it was the insurance carrier for the Senn-Herrick Corporation under both the District of Columbia and Maryland compensation laws (Appellant's App. 34),¹² and the Deputy Commissioner made a special finding

¹² See also the allegation in Travelers' Insurance Company's motion to intervene that at the time of appellant's injury it was the insurance carrier for his employer under the District of Columbia Compensation law. (Appellant's App. 6.)

of this fact. (Appellant's App. 23.) Certainly, if the Senn-Herrick Corporation was not carrying on any work in the District of Columbia it would not have secured the Travelers Insurance Company to carry its liability under the District of Columbia Compensation Act.

What more evidence is needed to establish the fact that the Senn-Herrick Corporation's employment was not confined to Bethesda, Maryland, but also was being carried on in the District of Columbia at the time of the appellant's injury?

The arbitrary manner in which the Deputy Commissioner completely ignored all the evidence placed in the record by the appellant to establish the true facts which form the basis for his claim is indeed amazing. Had there been any contradiction in the evidence in the record, some excuse might have existed for his prejudicial findings of fact, but there is no contradiction in the evidence establishing the facts in the case. And this is true, not only of the evidence establishing the fact that the Senn-Herrick Corporation was indeed carrying on employment at the Mellon Art Gallery at the same time it was employed at Bethesda, Maryland, but that the appellant was actually sent by the company from the Bethesda job to the Mellon Art Gallery job.

The appellant has been forced into this long and expensive court action apparently upon the views of the Deputy Commissioner as to the manner that construction work is carried on, as his findings are not supported by any evidence in the record before him. These findings of fact of the Deputy Commissioner are all the more glaringly erroneous and unwarranted in the light of this court pronouncement in the case of *Fidelity and Casualty Co., v. Burris*, 61 App. D. C. 228 59 Fed. (2d) 1042, that:

“* * * The underlying purpose of all compensation laws is to provide money indemnity in case of injury where there is no assignable fault. * * * *Where there is doubt, it should be resolved in favor of the injured employee or his dependent family* * * * (Emphasis supplied).

A pronouncement that has found favor in the eyes of other high courts:

(See *Southern S. S. v. Norton*, 101 F. (2) 825 (CCA 3rd); *Southern Pac. Co. v. Sheppard*, 112 F. (2) 147 (CCA 5th)).

(B) Had appellant's work been limited to the Public Health Center job his claim was erroneously rejected.

In discussing the application of the District of Columbia's Workmen's Compensation Act to the appellant's claim under the foregoing facts, the writer will first show to the court that the Deputy Commissioner's rejection of appellant's claim would not have been in accordance with law even if the only act of the Senn-Herrick Corporation in the District of Columbia had been that of its carpenter foreman, Lenck, securing the services of the appellant (and for the purpose of argument only, we shall assume that the appellant's services were to be confined to the Public Health Center job).

The writer's purposes in first limiting and narrowing the facts of the case for the purpose of his argument are two-fold and are as follows:

1. If the court finds that appellant's claim was erroneously rejected upon these narrow and limited facts, then it is obvious that the appellant's claim for compensation should not have been rejected under the full facts of the case, which include many grounds for holding that the appellant's claim comes within the District of Columbia's workmen's compensation law.

2. The extraterritorial provisions of the District of Columbia Workmen's Compensation Act has never been interpreted by this court in its relationship to the construction industry wherein workmen are compelled to go from construction project to construction project in various localities.

The court can take judicial notice of the fact that many buildings are being and will be constructed in territory adjacent to the District of Columbia, and that much of the manual labor employed for this hazardous work is obtained in the District of Columbia. Under the interpretation of the extraterritorial provision of the District of Columbia Workmen's Compensation Act that has been adopted by the Deputy Commissioner, the compensation claims of those workmen who are injured while working on these construction projects will be rejected (See Deputy Commissioner's Records. *Alma M. Hutton v. Edward A. Rule*, File No. 1667-112; *Joseph McKinney v. Harwood Nebel Construction Co.*, File No. 8143-256; *Gudmundson v. Senn-Herrick Corporation*, Case No. 12009-55), and they will be left to look to other sources for relief.

It is the writer's opinion that the Deputy Commissioner is sincere but misguided in his rejection of such compensation claims. It is felt that if this court concludes, as appellant contends, that such rejection insofar as appellant is concerned was not in accordance with law under those facts of the case to which we have limited ourselves for the purpose of this argument, then future claims based on analogous facts will not be rejected by the Deputy Commissioner and workmen will be able to obtain the compensation secured to them without the delay and cost of court proceedings.

- (1) **The District of Columbia Workmen's Compensation Act imposed a statutory liability on Senn-Herrick Corporation to pay compensation under that act.**

Section 4(a) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 904), which under Title 19, Chapter 2, of the District of Columbia Code, is applicable insofar as the District of Columbia Workmen's Compensation Act is concerned, provides

"Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 7, 8 and 9." (of the Longshoremen's Compensation Act.)

And Title 19, Chapter 2, of the District of Columbia Code defines an "employer" as "every person carrying on *any* employment in the District of Columbia."

Thus, when any person—and that would include a corporation by its agent (see Section 2 (1), 33 U. S. C. A. 902 (1))—comes within the District of Columbia and carries on any employment¹³ therein, he incurs the statutory liability to pay the compensation provided for in Sections 7, 8 and 9 of the Longshoremen's Compensation Act for any injuries that are sustained by his employees.

- (2) **Congress intended an act of hiring performed in the District of Columbia sufficient to subject an employer to liability under the Compensation Law.**

And that it was the intention of Congress to attach this liability to employers who do no more within the boundaries of the District of Columbia than secure workmen to work on construction projects outside of the District of Columbia is conclusively established by an interpretation of the phrase "carrying on any employment"¹⁴ as used by Congress to indicate the scope of the Act.

¹³ Certain specified employees and employment are not included within the scope of the Act. The exemptions are not involved in the instant case.

¹⁴ The phrase itself is evidently novel in legislative enactments, as a search of the various works that specialize in judicial interpretation of phrases, and a search of the case books, fail to reveal any previous use of that phrase. The meaning of the phrase must then be obtained from lay sources until a judicial interpretation is available.

Webster's New International Dictionary defines "employment" as the "act of employing or state of being employed; that which engages or occupies; that which consumes", and Black's Law Dictionary defines the word as an "act of hiring * * *."

The word "any" is defined in Websters New International Dictionary as "One indifferently out of a number; one indiscriminately of whatever *kind* or *quantity* * * *."

Thus, it is seen that, if an ordinary interpretation is applied to this language, one act of hiring—and that would certainly include the making of an offer of employment and the entering into a contract of hire—performed by an employer in the District of Columbia, is sufficient to subject that employer to the District of Columbia Workmen's Compensation Act.

But, in addition to the ordinary interpretation of the words showing that such was the intention of Congress, those words should be given a very liberal interpretation that the Act might be broadly construed and applied. See *Standard Accident Insurance Company v. Hoage*, (*supra*), *Cardillo v. Liberty Mutual Insurance Co.*, 101 F. (2d) 254; *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408, 76 L. Ed. 366; *Maryland Casualty Co. v. Lawson*, 101 F. (2d) 732; *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862; *Industrial Commission of Colorado v. Aetna Life Ins. Co.*, 64 Colo. 480, 174 Pac. 589; *Pierce v. Benkins' Van & Stor. Co.*, 185 Iowa 1346, 172 N. W. 191.

Further, consider the uniqueness of the economic and territorial composition of the District of Columbia. It is composed of but 69.245 square miles (City Directory source of this figure), with little or no manufacturing carried on within its borders.

Most of the people gainfully employed therein work either for the Federal Government or are engaged in non-

hazardous clerical positions, and it is, therefore, those among its citizens who are engaged in construction work that have the greatest need for the protection of a compensation act. These workmen must follow construction jobs from place to place and are often called upon to work temporarily beyond the limited boundaries of the District of Columbia. This condition has been amplified by the now crowded condition of the District of Columbia. Construction companies from various states come here to obtain work in outlying districts (mostly buildings of the federal government) and look to the District of Columbia for their supply of labor, just as the Senn-Herrick Corporation did in the instant case.

Congress must have considered these factors which distinguish the District of Columbia from the various states when it wrote a compensation act so broad that this court was prompted to say concerning it:

“Moreover it should be observed that the language employed by Congress in the Act of May 17, 1928 (District of Columbia Workmen’s Compensation Act) * * * is *remarkably broad* * * *

“*The comprehensive language employed in the foregoing Act distinguishes it from many of the compensation enactments in force in the several states and gives evidence of the purpose of Congress that the law in the District of Columbia in compensation cases shall be broadly construed and applied.*” (Standard Accident Ins. Co. v. Hoage, *supra*.) (Emphasis supplied.)

(3) Public Policy Dictates that the Act should so apply.

The purpose of compensation acts is to prevent injured workmen from becoming public charges. As was stated by the Supreme Court in the case of *New York Central Railway Co. v. White*, 243 U. S. 188, 61 L. Ed. 667, which concerned the constitutionality of the New York Workmen’s Compensation Act:

“Under the present system, the injured workman is left to bear the greater part of the industrial accident loss, which, because of his limited income he is unable to sustain so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity * * *. One of the grounds of its (Workmen’s Compensation Act) concerns with the continued life and earning power of the individual is its interest in the prevention of pauperism with its concomitants of vice and crime.”

See also, *Industrial Commission of Colorado v. Aetna Life Insurance Co.* (*supra*); *Post v. Burgen & Gehlke*, 216 N. Y. 544, 111 N. E. 350; *Anderson v. Miller Scrap Iron Co.*, 169 Wisc. 106, 170 N. W. 275; *Pickering v. Industrial Commission*, 59 Utah 35, 201 Pac. 1029.

If this purpose is to be fulfilled by the District of Columbia Compensation Act, it must apply in the instant case for the following reasons:

(1) Appellant is a resident of the District of Columbia. He worked but a few miles beyond its boundary and his work there was not permanent. His family remained in the District of Columbia and he returned each night to his home. If deprived of income, he and his family would look for relief to the local welfare agencies and they would be obligated to provide relief, not those of the State of Maryland.

(2) When appellant was injured he was brought to the Emergency Hospital in the District of Columbia and there treated by local doctors. Hospital and medical care and its accompanying expenses were, therefore, the concern of the District of Columbia and not the State of Maryland.

(3) Congress has established certain rates of compensation, which is an expression of the amount of compensation necessary to carry out the purpose of the Act. Should the compensation rate at the place of injury be less than the prescribed compensation in the District of Columbia Act,

the disabled workman becomes a potential public charge¹⁵.

In the instant case the appellant, under the Maryland law, would be entitled to compensation payments of \$20.00 per week during his period of disability, a total payment of \$1800.00, for injury to the sight of his left eye, and the employer would be liable for only \$500.00 in medical fees. (See Section 36, Article 101; Vol. 2, Bagby's Edition Annotated Code of Maryland (1924).)

Had appellant been injured in Virginia, his compensation would have been even less than is provided by the Maryland Compensation Act. (See Chapt. 400, Laws of 1918; entitled "The Virginia Workmen's Compensation Act", as amended.)

Under the District of Columbia Act appellant would receive \$25.00 per week while disabled (Section 66), and \$3500.00 for the loss of his eye (Section 8(c) (5)), and all necessary medical care (Section 7) would be furnished¹⁶.

Therefore, should the order of the Deputy Commissioner rejecting appellant's claim for compensation not be ordered set aside, appellant would immediately become liable for over \$400.00 in hospital and medical expenses, the difference between the \$500.00 liability imposed on the employer under the Maryland Act and the more than \$900.00 medical expense of the appellant at the time of the hearing (Appellant's App. 49)¹⁷, and the appellant would lose the difference between the compensation prescribed in the local Act and that prescribed in the Maryland Compensation Act—a total of approximately \$2500.00.

It may well be that the amount of compensation prescribed in the Maryland Act would enable a person to main-

¹⁵ The Compensation Act contains provisions for the appointment of guardians for dependents of deceased workmen (33 U.S.C.A. 908 (22(d)(3))), and for vocational rehabilitation of permanently disabled workmen (33 U.S.C.A. 908 (22(d)(5)(g))), and contains other features all of vital concern to the citizens of the District of Columbia.

¹⁶ In the instant case the appellant's earning capacity was sufficient to bring him the maximum compensation under either act.

¹⁷ What additional medical expenses have accrued since the time of the hearing naturally do not show in the record.

tain himself quite satisfactorily in Maryland, but it does not follow that, therefore, a man could do likewise in the District of Columbia. It is well known that living expenses in the District of Columbia are among the highest in the United States (see Washington Post, July 9, 1941, first page). If appellant is made to pay this hospital bill and lose this \$2500.00 differential between the two Acts, he might readily become a charge on the people of the District of Columbia, for a man with but one eye and a broken back is not able to compete in the labor market with carpenters not suffering such disabilities. This will become more real when the present national emergency, with its extensive construction activity, has ended.

(4) In addition to the amount of disability to be paid, the administration of compensation cases is important. Other compensation laws may provide for a cumbersome procedure that would delay compensation payments, and a resident workman would become a public charge on the District of Columbia until his right to compensation under some state act would be determined.

Also, the distance an injured workman might have to travel and the time involved weighs heavily in determining public interest. As was said in the case of *United States Casualty Company v. Hoage, supra*, "To require him to go to Alabama for redress might result in serious embarrassment and impose a burden on the District of Columbia; in other words, the employee in case of injury might become a public charge. *Moreover, in such a situation as confronts the employee time and expense are important considerations.*"

(5) It is quite possible that an employee hired in the District of Columbia to work in a foreign state may not be

able to recover compensation in that state, though the injury occurred there.

This is illustrated by the case of *Cole v. Industrial Commission*, 353 Ill. 415, 187 N. E. 520. In that case a construction worker was hired in Indiana to work on a construction project in Illinois. He was injured in Illinois and sought compensation under that act. The court refused compensation, holding:

“The contract of employment herein having been entered into in the State of Indiana between parties who were subject to the terms of the Industrial Compensation Act, the provisions of the Act for an exclusive remedy under it must prevail.”

See also *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145; *Hopkins v. Matchless Metal Polish Co.*, 99 Conn. 457, 121 Atl. 828.

If, therefore, a precedent is established in the instant case, that, though an employee is hired in the District of Columbia, he cannot recover compensation under its acts if hired to work in a foreign jurisdiction and injured therein, an employee might be compelled to return to the District of Columbia and look to charity for support. Such a situation is not by any means inconceivable.

(4) The Constitution does not bar Congress from imposing such a liability on an employer.

As we have seen, Congress has clearly indicated that it intended the District of Columbia Workmen's Compensation Act to apply in cases wherein employers come into the District of Columbia to obtain a labor supply, and public policy dictates that the Act should so apply. There is no reason, therefore, why it should not apply.

A legislative body within its police powers certainly can impose liability on a person as a consequence of the doing of a specified act within the territorial jurisdiction of that legislative body.

For example, in the case of *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, a statute providing that anyone who operated a motor vehicle upon the highways of Massachusetts was deemed to appoint a specified officer of the state as an agent for the service of process, was held valid, the court stating, "When the law clothes an intentional and intelligent act with specified consequences, then the doing of that act commonly entails those consequences."

Since it is no longer open to controversy that a legislative body under its police powers may impose a liability upon a person to pay compensation for the injuries of his employees suffered during the course of employment (*New York Central v. White, supra*), there can be no doubt that Congress could impose such a liability upon the Senn-Herrick Corporation, that company having subjected itself to the jurisdiction of the District of Columbia when its carpenter foreman, Lenck, in quest of workmen on behalf of his employer, came into the District of Columbia and employed Gudmundson, a resident therein.

The fact, as adopted for the purpose of this argument only, that the Senn-Herrick Corporation was not doing some construction work within the jurisdiction of the District of Columbia at the time of the injury, and that its activities therein were limited to hiring the appellant, does not affect its liability to pay compensation for the District of Columbia's Workmen's Compensation Act is not concerned with the injury nor with jurisdiction over the employer at the time of the injury.¹⁸ The statute is concerned only with the acts of employers in the District of Columbia at the time they are performed and whether or not an in-

¹⁸ The difference between jurisdiction over a person to subject him to a statutory liability within the police powers of a sovereignty and jurisdiction over a person for the purpose of enforcing a liability should be noted. The instant case is concerned only with the former.

jury occurs as a consequence of those acts the liability to compensate exists.

Nor does the fact that the injury occurred in Maryland affect the result, for Congress has specifically provided that the liability to compensate exists irrespective of the place where the injury occurs, and the validity of workmen's compensation laws which impose liability for an injury outside of state borders has been definitely established. See *Quong Ham Wah Co. v. Industrial Accident Com.*, 184 Calif. 26, 192 Pac. 1021 (Aff. 255 U. S. 445; 41 S. C. 373, 65 L. Ed. 723); *Bradford Electric Light v. Clapper*, *supra*; *Alaska Packers Association v. Maryland Accident Com.*, 294 U. S. 532, 79 L. Ed. 1044.

It has been recognized in those cases and numerous others, which hold in the same vein, that a state, by applying its compensation act to injuries sustained beyond its territorial limits, is not attempting to make its laws applicable in a foreign jurisdiction, but is merely enforcing in its own jurisdiction its own laws which it has enacted to regulate matters subject to its jurisdiction.

The Congress could, therefore, constitutionally legislate to impose a liability on employers who come into the District of Columbia only for the purpose of obtaining the services of workmen.

However, we do not contend that a mere act of hiring a workman in the District of Columbia, in the absence of some factor denoting a public interest of the District of Columbia, such as is given by the fact of residence and other factors heretofore discussed, is sufficient to subject an employer to liability under the Act. There is a legislative sphere which limits Congressional action. The District of Columbia Act can apply and should be interpreted

as intended to apply only within that sphere. (*Crowell v. Benson, supra.*)

In the instant case and in analogous cases involving workmen who are residents the District of Columbia has a public interest and the Act functions for the public health, safety welfare and should apply.

- (5) **Because lex loci contractus governs the rights of the parties, appellant's claim is within jurisdiction of District of Columbia Compensation Law.**

Under the foregoing argument, the fact that appellant's contract of hire was entered into in the District of Columbia is important only in that it establishes the performance of a most definite act of employment in the District of Columbia by the Senn-Herrick Corporation. However, even accepting the Deputy Commissioner's unsupported finding that the contract of hire was entered into in Maryland, since the Senn-Herrick Corporation came into the District of Columbia and there induced appellant to go to Maryland it is liable to pay appellant compensation under the District of Columbia law because of that act.

However, even had Congress not used such comprehensive language in the District of Columbia Workmen's Compensation Act and had not specifically provided that the Act should apply irrespective of the place of injury, the appellant's claim would have been within the jurisdiction of the District of Columbia's Workmen's Compensation Act because the contract of hire was entered into in the District of Columbia.

It is well established that the law of the place where a contract is entered into becomes a part of that contract and governs the relationship of the contracting parties and their duties and obligations to the state. (See *Mutual Life Insurance Co. v. Cohen*, 179 U. S. 262, 45 L. Ed. 181;

Mutual Life Insurance Co. v. Liebing, 259 U. S. 209, 66 L. Ed. 900; and *Levy v. Daniels' U Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163.

This principle of law has been applied to extend the benefits of compensation acts (lacking so-called extra-territorial provisions, such as is incorporated in the District of Columbia Workmen's Compensation Act), in order that resident workmen, injured beyond state boundaries, should not be denied the protective legislation intended for them.

It was first expounded in the case of *Deeny v. Wright & Co.*, 36 N. J. L. J. 121 (1913), which was perhaps the second case before the courts of this country involving the question of the applicability of a compensation act to any injury occurring beyond the boundaries of the state of its enactment.¹⁹ The court stated:

"It would seem that the reasonable construction of the statute is that it writes into the contract of employ-
men certain additional terms. The cause of action of
petitioner is *ex contractu*. The *lex loci contractus*
governs the construction of the contract and deter-
mines the legal obligation arising from it."

Courts throughout the country have adopted and followed this principle in order that the citizens of the state should have the full benefits of the legislation enacted for their protection. Cases following this principle are too numerous to discuss or even cite; however, the court's attention is directed to the following representative group: *Grinnell v. Wilkinson*, 39 R. I. 447, 98 Atl. 103; *Industrial Commission v. Aetna Life Insurance Co.*, (*supra*); *Pierce v. Benkin's Van & Stor. Co.*, (*supra*); *Rounsaville v. Cen-*

¹⁹ The first such case was *Gould's case*, 215 Mass. 480, 102 N.E. 693 (also 1913), in which the court held that a compensation act created a statutory tort and the place of injury, therefore, determined the right of recovery. This theory has long since been repudiated and abandoned. (*Bradford Electric Light Co. v. Clapper, supra.*)

tral Railroad Co., 87 N. J. L. 371; 94 Atl. 392; *Crane v. Leonard, Crosetti & Riley*, 214 Mich. 218, 183 N. W. 204.

And this principle has been applied though all the work of the employee was to be performed in a foreign state. See *Smith v. Van Nay Interstate Company*, 50 Tenn. 25, 262 S. W. 1048; *Hulswit v. Escanaba Mfg. Co.*, 218 Mich. 331, 188 N. W. 411; *McLaughlin's case* (Mass.), 274 Mass. 217, 174 N. E. 338; *Zurick Accident & Liability Ins. Co. v. Industrial Commission*, 193 Wis. 32, 213 N. W. 630; *Association Indemnity Corp. v. Scott*, (CCA 5th) (Texas) 103 F. (2d) 203, *supra*; *Hargis v. McWilliams Co.*, ...La., 119 So. 88.

Perhaps it shall be contended that the basis for the holding that a compensation act becomes part of the contract of hire is that in many of those states, which so hold, the compensation act is elective. This contention, however, is not tenable for two reasons.

First, it has been observed by students of the subject that so-called elective compensation acts are such in theory only, while, in fact, they are compulsory, the elective feature having been adopted only because of some fancied constitutional bar to a compulsory act. Under these so-called elective acts the parties are, in truth, coerced into electing to come under the act because of disadvantageous conditions imposed upon them if they fail to do so. See *Dwan, Workmen's Compensation Act and the Conflict of Laws*, 11 Minn. Law Rev. 329.

Secondly, states which have compulsory acts, as well as states having elective acts, have followed this principle. See *Recovery Under Workmen's Compensation Acts For Injury Abroad*, *Angell*, 31 Harvard Law Rev. 619. See, also, *Anderson v. Miller Scrap Iron Company*, (*supra*), in which it is stated:

“Neither in our opinion does the fact that the law has an elective feature and is not compulsory, materially affect the question * * * The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract.”

In view of the fact that in numerous states the protection of workmen's compensation is extended to benefit the workmen of those states when they are injured outside of the state, even though the legislative body had not seen fit to specifically provide for such protection, in the instant case, wherein the compensation act involved contains the broadest conceivable extraterritorial provision, protection of that act certainly cannot be denied a workman hired in the District of Columbia and injured but a few miles beyond its boundaries.

(6) The New York rule is not applicable in the District of Columbia.

Appellees contended in the court below that the law with respect to the extraterritorial effect of workmen's compensation acts has been correctly expressed in the case of *Cameron v. Ellis Construction Company*, 252 N. Y. 394, 169 N. E. 662. In that case the New York court held that where work was performed at a fixed place outside the State of New York, the law of the place where the work was performed should apply in the event of injury.

There are two answers to appellees' contention which demonstrate its fallacy.

First, the court, in the case of *Cameron v. Ellis Construction Company (supra)*, specifically noted that the compensation law of New York contained no extraterritorial provisions, the court stating:²⁰

²⁰ The court likewise notes, “* * * here it seems to us quite evident that claimant was not employed in New York”.

“Nothing in the statute suggests that the State of New York has attempted to stretch forth its arm to draw within the scope of its own regulations the relation of employer and employee conducted beyond its borders.”

Therefore, the decisions of the New York courts, insofar as the extraterritorial effect of the District of Columbia Act is concerned, cannot be at all controlling.

Second, the economic and territorial composition of the State of New York and the District of Columbia are as far apart as the poles. We have pointed out heretofore the uniqueness of the District of Columbia. A comparison with the State of New York at this point is, therefore, not necessary.

Each sovereignty must enact and interpret its laws to best fit the pattern of its economic and territorial makeup. The law as expressed in the case of *Cameron v. Ellis Construction Company, supra*, is, perhaps, ideal insofar as New York State is concerned since it has been interpreted to operate as a regulation of business located and conducted from within its jurisdiction (see *Salmon v. Continental Blade Co.*, 248 App. Div. 928, 290 N. Y. S. 242), but such an interpretation would operate to largely destroy the benefits of the District of Columbia Act since few, if any, business enterprises of national scope are located in and conducted from the District of Columbia.

Only if the District of Columbia Workmen's Compensation Act is interpreted to apply in cases wherein employers come within the jurisdiction of the District of Columbia to obtain their supply of labor (a most necessary part of the conducting of a business, particularly the transitory construction business) can the workingmen and the citizens of the District of Columbia obtain the full benefit of the law.

Other states (notably California (see *Globe Cotton Mills v. Industrial Accident Commission*, (*supra*))) have succeeded in accomplishing this so that their workmen can enter into contracts of hire to work beyond the boundaries of the state with confidence that they and their families will be protected should injury terminate or lessen their earning capacity. The language employed in the compensation acts of these states is not so broad or comprehensive as that of the District of Columbia Workmen's Compensation Act, yet such protection has not as yet been made available to the working men of the District of Columbia. This can result only because of the narrow conception of public interest in industrial injury that has been adopted by the defendant Deputy Commissioner and his erroneous interpretation of the District of Columbia Compensation Act.

(C) Under the full facts of the case, it is not distinguishable from this court's decision in *Moyer v. Cardillo*, 119 F. (2) 785.

The foregoing argument is based on the assumption, for the purpose of argument, that the Senn-Herrick Corporation was engaged in no activities in the District of Columbia other than that of entering into a contract of hire with appellant therein. However, as the evidence in the record shows, this was far from the facts of the case.

We have shown that the company was carrying on construction work at the Mellon Art Gallery job at the time of appellant's injury. We have shown that, just prior to his injury, appellant actually worked for the Senn-Herrick Corporation at that construction project in the District of Columbia and, most important of all, that appellant had been a resident of the District of Columbia for seven years.

What other facts could possibly be necessary to establish a compensation claim under the District of Columbia Workmen's Compensation Act? The record shows an "employ-

er"—the Senn-Herrick Corporation—"carrying on (any) employment" in the District of Columbia—the Mellon Art Gallery job. It shows an "employee" of that employer—appellant (in whom the District of Columbia had a public interest because of his residency therein)—and it establishes an injury. Only if the words "irrespective of the place where the injury * * * occurs" are to be deleted from the Act and it be amended in the following vein, "provided that this Act shall not apply in respect to the injury of a construction worker sustained during the course of his employment on a construction project outside of the territorial limits of the District of Columbia," could it be contended that, under the full facts of this case, the appellant's compensation claim was properly rejected.

It is felt that no extensive argument is necessary to establish that the Deputy Commissioner's rejection of appellant's claim was not in accordance with law under the full facts of the case since all the arguments set forth heretofore are applicable and in view of the decision of this court in the case of *Moyer v. Cardillo* (Feb. 24, 1941), 119 F. (2d) 785, ... App. D. C...., decided since the entry of the order from which this appeal is taken.

Furthermore, Section 20 (Longshoremen's Workmen's Compensation Act) (33 U. S. C. A. 920), provides as follows:

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

Under the clear language of this section, a claim comes within the provisions of the Act if some evidence is not introduced by the employer to establish that he has no liability. In the instant case, not one witness testified that the Senn-

Herrick Corporation was not carrying on employment in the District of Columbia, and not one witness testified that the appellant did not work in the District of Columbia for the Senn-Herrick Corporation. Only by completely ignoring this clear provision of the Act could the Deputy Commissioner reject appellant's claim under the uncontradicted facts of the case.

(D) The Supreme Court cases, and the District of Columbia's interest in the appellant's claim.

The Supreme Court of the United States has passed upon the question of the extraterritorial effect of Workmen's Compensation Acts on several occasions. (See *Bradford Electric Co. v. Clapper*, *supra*; *Alaska Packers Association v. Industrial Accident Commission*, (*supra*); *Pacific Employers' Ins. Co. v. Ind. Acc. Com. of Calif.*, 306 U. S. 493; 59 S. Ct. 629; (*Accord: United States Casualty Co. v. Hoage*, 77 F. (2d) 542, 64 App. D. C. 284, (*supra*).)

Lacking sufficient pages to discuss these cases, the writer will merely state that the gist of these decisions is that the place where an injury occurs is of no concern in the application of workmen's compensation laws, but that the law of the state that has the greatest public interest in the injured workman should apply. We have shown, heretofore, that the interest of the State of Maryland in appellant is nil, while that of the District of Columbia is exceedingly great. It follows that there is no constitutional bar to the application of the District of Columbia's Compensation Act to appellant's claim but that in fact it should apply.

(E) The fact appellant received some compensation under the Maryland law does not affect his claim.

One argument advanced in the court below by counsel for the appellee, Travelers' Insurance Company, was that since the appellant had received some compensation under the Maryland Act his claim under the District of Columbia

Act should be rejected. Evidently the Deputy Commissioner relied to some extent upon this fact in rejecting appellant's claim, for he made the specific finding that "a remedy under the Maryland Compensation Law has been provided the injured employee; that it is therefore unlikely that the employee will become a public charge in the District of Columbia."

This argument of appellee's counsel is so untenable and this finding of the Deputy Commissioner so contrary to law that argument is scarcely necessary.

Courts have been practically unanimous in holding that recovery under one compensation act is no bar to recovery under another applicable act. In the case of *Anderson v. Jarrett Chambers Company*, 210 App. Div. 543, 206 N. Y. S. 458, the court said:

"It has long been the settled law of this state that this does not prevent his obtaining compensation in the State of New York providing the claimant is entitled to aid under the facts in his case."

(See also *Jenkins v. T. Hogan & Sons*, 177 App. Div. 36, 163 N. Y. S. 707; *Gilbert v. Des Lauries Column Mould Company*, 180 App. Div. 59, 167 N. Y. S. 274.)

The bases of these New York Court decisions are that:

(1) The act primarily imposed a liability upon the employer—not a right to the claimant. (2) The act specifically provided that recovery, other than that prescribed in its terms, is no bar to recovery under the act.²¹ (3) An injured employee with no earning capacity could ill afford to refuse to accept that compensation which is offered by his employer, though it be under a less favorable act.

²¹ The District of Columbia Act in this is practically verbatim to the New York Act, Section 15(b) (33 U.S.C.A. 915(b)) providing "no agreement by an employee to waive his right to compensation under this chapter shall be valid", and Section 16 (33 U.S.C.A. 916) providing that "no assignment, release, or commutation or compensation or benefits due or payable under this chapter * * * shall be valid * * *"

(See also *McLaughlin's Case*, (*supra*); *Texas Employers' Industrial Assoc. v. Price*, (Tex.) 300 S. W. 667; *Rounsaville v. Central Railway Co.* (*supra*).)

Our argument heretofore, under "Public Policy Dictates That The Act Should So Apply," (*supra*, pg. 34) sufficiently covers the unwarranted attempt of the Deputy Commissioner to determine for himself, rather than leave to Congress, the amount of compensation necessary to prevent an injured workman from becoming a public charge.

Under the Deputy Commissioner's conception of the District of Columbia Workmen's Compensation Act, the thrifty workman who could maintain himself from his savings during temporary disability would be denied compensation.

Sufficient to say, such is not the law.

Conclusion.

We respectfully submit that the judgment of the District Court should be reversed, and that a judgment should be ordered which sets aside the compensation order rejecting appellant's compensation claim and orders the Deputy Commissioner of the District of Columbia Compensation District to take jurisdiction over appellant's compensation claim.

Respectfully submitted,

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No. 7851

**In the United States Court of Appeals for the
District of Columbia**

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

APRIL TERM, 1941

FILED OCT 2 - 1941

EVERETT M. GUDMUNDSON, APPELLANT

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF CO-
LUMBIA DISTRICT, AND TRAVELERS INSURANCE COMPANY,
APPELLEES

CLERK
Joseph W. Stewart

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1941

No. 7851

EVERETT M. GUDMUNDSON, APPELLANT

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA DISTRICT; AND TRAVELERS INSURANCE COMPANY; APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA*

BRIEF AND APPENDIX ON BEHALF OF APPELLEES

COUNTER STATEMENT OF CASE

The facts as forth in appellant's "Statement of the Case," that is, the course of the pleadings, appear to be substantially correct and we shall only briefly enlarge thereon. This case arises out of a compensation order filed on May 22, 1940, by the appellee, Frank A. Cardillo, deputy commissioner, District of Columbia compensation district, United States Employees' Compensation Commission, in which the deputy commissioner rejected the claim for compensation filed under the District of Columbia workmen's compensation law by the appellant, Everett M. Gudmundson, for compensation for disability resulting from an injury Gudmundson sustained on May 25, 1939, while working as a car-

penter on the National Institute of Health buildings at Bethesda, Maryland, for the Senn-Herrick Corporation, a New York construction company. The deputy commissioner rejected Gudmundson's claim upon finding "That the claim does not come within the provisions of the District of Columbia workmen's compensation law" (Appellant's App. 23). The said compensation order was issued by the deputy commissioner pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424; U. S. C. Title 33, Chapter 18, sec. 901 *et seq.*), as made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600, Chapter 612, sec. 1; D. C. Code, 1929, Title 19, Chapter 2, sec. 11). Prior to filing claim for compensation with the appellee Cardillo, deputy commissioner, appellant had on or about June 12, 1939, filed claim with the Maryland Industrial Accident Commission, of Baltimore, Md., and on June 26, 1939, the Maryland Commission awarded compensation to Gudmundson for disability resulting from said injury (Appellee's App. 51).

The appellant instituted a proceeding for judicial review in our lower court seeking to have that court review and set aside as not in accordance with law said compensation order, issued by Deputy Commissioner Cardillo on May 22, 1940. Appellant's original complaint did not pray for a trial *de novo* but merely sought judicial review of the record. Separate motions to dismiss the original complaint were filed on behalf of the deputy commissioner and on behalf of the Travelers Insurance Company, insurance carrier, which was granted leave to intervene in the case (Appellant's App. 1, 4, 7). The cause came on for hearing before Mr. Justice Bolitha J. Laws who in a memorandum opinion filed November 5, 1940, held that "If a right exists in this Court to pass upon the question of jurisdiction of the Deputy Commissioner it is by way of a trial *de novo*, not by way of passing upon the legal sufficiency of the evidence before the Deputy Commissioner," the court citing as a basis for its ruling the case of *Crowell v. Benson*, 285 U. S. 22 (Appellant's App. 7, 8). Following this ruling by Mr. Justice Laws the plaintiff, Gudmundson, filed an

amended complaint in which he prayed "That the Court grant plaintiff a trial *de novo* for the purpose of hearing testimony and taking testimony for a determination of jurisdiction of the defendant, Deputy Commissioner, over plaintiff's claim for compensation" (Appellant's App. 12, 14). Separate motions to dismiss the amended complaint were filed by the intervening defendant Travelers Insurance Company and defendant Cardillo (Appellant's App. 14, 15). These motions to dismiss came on for hearing before Mr. Justice T. Alan Goldsborough who denied plaintiff's request for trial *de novo* and by order dated January 27, 1941, dismissed the amended complaint. It is from this order that the present appeal has been taken (Appellant's App. 17, 18).

STATUTE INVOLVED

Act of May 17, 1928 (45 Stat. 600, Chapter 612, sec. 1; D. C. Code, 1929, Title 19, Chapter 2, sec. 11), which provides as follows:

That the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

QUESTIONS INVOLVED

The questions for the determination of this Court appear to be in substance (1) whether the court erred in denying appellant's prayer (in the amended complaint) for a trial *de novo*, and (2) whether the deputy commissioner properly found from the evidence that Gudmundson's injury did not come within the purview of the Act of May 17, 1928, quoted above.

SUMMARY OF ARGUMENT

1. The court properly denied appellant's request for trial *de novo* and properly determined the issues on the basis of the record before the deputy commissioner, because:

(a) There being no *constitutional fact* question in this case, the decision of the Supreme Court in the case of *Crowell v. Benson*, 285 U. S. 22, relied upon by appellant, has no application.

(b) The decision of the Supreme Court in the *Benson* case applied to a case arising under the *admiralty jurisdiction* in which it was specifically pleaded that a constitutional right had been impaired. The present case does not arise under the admiralty jurisdiction and no constitutional question is involved.

(c) The District of Columbia compensation law does not authorize judicial review by a proceeding in the form of a trial *de novo*. The findings of fact of the appellee deputy commissioner on all matters at issue before him, except constitutional fact questions, should be regarded as final and conclusive where supported by evidence.

2. The deputy commissioner properly found from the evidence that appellant's claim for compensation did not come within the purview of the District of Columbia workmen's compensation law, because:

(a) With respect to the Bethesda job on which the appellant was working at the time of injury, the status of employer and employee did not exist in the District of Columbia.

(b) The deputy commissioner found that appellant's contract of hire was made in the State of Maryland and his findings of fact with respect thereto, being supported by competent evidence, should be regarded by the court as final and conclusive; that the law of the place where the contract of hire is to be performed and where the employment is localized applies. In the present case the employment contract was to be performed exclusively in the State of Maryland. The employer was a foreign corporation with its principal place of business in the State of New York. The employee was engaged in an employment, a major operation, to be performed wholly at a fixed place of employment in the State of Mary-

land. With respect to the Bethesda job, no "employment" existed in the District of Columbia. Under the circumstances, appellant's claim for compensation does not come within the purview of the District of Columbia workmen's compensation law.

ARGUMENT

I

The Court did not err in denying the prayer of appellant for a trial *de novo*

On pages 9 to 12 of appellant's brief it is contended that the lower court erred in not granting appellant's prayer for a trial *de novo*, appellant contending that such a trial was authorized on the basis of the decision of the Supreme Court in the case of *Crowell v. Benson*, 285 U. S. 22. On pages 13 to 15 of appellant's brief it is set forth, in substance, that appellant did not wish the Court to examine the record before the deputy commissioner merely to see whether it contained a legal sufficiency of evidence to support the deputy commissioner's findings, but desired the Court to reweigh the evidence and determine for itself the facts involved in the case.

Appellant's original complaint specifically prayed that the record of the proceedings before the deputy commissioner "including testimony, evidence, and exhibits taken, the findings, conclusions, and order" of the deputy commissioner "be reviewed by this Court" (Appellant's App. 1, 3). The transcript of the testimony taken at the hearing before the deputy commissioner was made a part of the complaint by stipulation of counsel (Appellant's App. 4). The original complaint contained no prayer for a trial *de novo*. The trial *de novo* question was injected in the case by Mr. Justice Laws in his memorandum opinion of November 5, 1940 (Appellant's App. 8, 9).

It is respectfully submitted by the appellees that procedure by trial *de novo* in this case is improper and not authorized by the compensation law nor warranted by the decision of the Supreme Court in *Crowell v. Benson*, *supra*, and that Mr. Justice Goldsborough, therefore, properly denied appellant's prayer in his amended complaint for such a trial.

There is no provision in the District of Columbia workmen's compensation law authorizing a trial *de novo*, nor would it be proper to construe the law as authorizing such a proceeding. Section 21 (b) of the law, it has been repeatedly held, authorizes only a *judicial review* of a compensation order, and section 21 (d) of the same law provides that "Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18." The whole procedure of a trial *de novo* would obviously tend to defeat the purpose of Congress to provide a summary, expeditious, and inexpensive adjudication of claims for compensation under the compensation law and is contrary to fundamental administrative law. It is desired also to emphasize that *no constitutional question is involved in the present case*.

The appellant in urging that he is entitled to a trial *de novo* has raised a very nice question of administrative law. It would unduly burden this brief to develop its ramifications. We shall, therefore, state our view, and if the Court should desire to consider the matter more in detail, a reference is given below to a law review article in which the subject has been thoroughly explored. For the purpose of our brief summary it may be stated that we concede for the purpose of review that there are only three categories of fact: (1) ordinary fact, (2) statutory jurisdictional fact, and (3) constitutional fact. In the matter of judicial review of administrative action, an example of *ordinary fact* question may be stated as the question whether or not the employee was disabled for a claimed period. As an example of *statutory jurisdictional fact* we suggest the fact question: Did the injury arise out of and in the course of the employment? Or in relation to the present case: Was the injury sustained within the purview of the District of Columbia workmen's compensation statute? As an example of the *constitutional fact type* of question an example may be stated: Did the injury occur on the navigable waters of the United States?—a constitutional fact question referred to in *Crowell v. Benson*, as Con-

gress has no jurisdiction in relation to land injuries coming under State laws.

With respect to questions of *ordinary fact* and *statutory jurisdictional fact*, the rule has been consistently followed that where there is evidence to support the administrative finding of fact, the courts will not disturb such findings. With respect to *constitutional facts*, however, we concede that a trial *de novo* may be granted, not as a matter of right but as a matter of judicial discretion. The case of *Crowell v. Benson* can be construed logically and will be found to fit other patterns only if it is construed as authorizing trial *de novo* in cases involving constitutional fact questions. Where the subject-matter is clearly within the authority of Congress to legislate, no constitutional fact question would arise in the sense here mentioned. The normal questions in such a case would be either of the ordinary fact type or the statutory jurisdictional fact type, neither of which would include the question whether Congress exceeded its constitutional authority or whether the constitutional prerogatives of the Court have been impaired. In cases involving statutory jurisdictional fact questions, the question is whether the administrative officer acted within the framework of the statute and under his statutory authority. In compensation cases involving constitutional fact questions a much broader inquiry may be made by the Court; that is: Did Congress have authority under the Constitution to enact the particular legislation or in enacting the particular legislation has Congress sought to deprive the Federal judiciary of any of its constitutional power? In *Crowell v. Benson* all fact questions relating to whether Congress had authority to apply the Longshoremen's Act, in the particular case, and to affect the constitutional power of the courts thus became fact questions of the constitutional type, with respect to which the Federal court is empowered to disregard administrative findings of fact and to elicit facts upon its own inquiry.

This so-called doctrine of constitutional fact may be made somewhat clearer by references to decisions of the Supreme Court subsequent to *Crowell v. Benson*. In the case of *South Chicago Coal and Dock Company v. Bassett*, 309 U. S. 251 (1940), the lower court had granted a trial *de novo* on the ques-

tion whether or not the employee was a member of the crew. If he was a member of the crew, the employee was outside the purview of the Longshoremen's Act. A trial *de novo* was granted by the District Court on the theory that a "jurisdictional" question was involved. The only real question involved was a *statutory jurisdictional* one; namely, whether the employee came within the purview of the statute. When this case reached the Supreme Court, that Court held that whether the employee was or was not a member of the crew (the statutory jurisdictional fact) was a fact question solely within the province of the deputy commissioner to determine upon evidence, and where there is evidence to support his finding, the finding is conclusive. While the issue before the Supreme Court was whether or not there should have been a trial *de novo*, it is highly significant to note that the Supreme Court in its opinion (written by the Chief Justice who also wrote the opinion in *Crowell v. Benson*) did not at any place cite or refer to *Crowell v. Benson*. The only conclusion permissible is that the Supreme Court took the view that the question involved was merely a statutory jurisdictional fact question, the precise type of question which appears in the present case.

In the present case it is within the power of Congress to enact workmen's compensation legislation for employees of the District of Columbia, and it is equally within the power of Congress to give the local Act the extraterritorial application which it has. State compensation laws have similar extraterritorial features and for many years State acts have been applied so as to afford protection to employees injured outside of the territorial jurisdiction of the State whose law is invoked. The only manner in which a relevant constitutional fact question could have been raised in the present case would have been for the *employer or insurance carrier* to have urged the question, *upon an award to an employee* injured outside of the District of Columbia, that the local Act could not be applied as extending beyond the geographical limits of the District. If the constitutionality of the local Act had been thus raised upon this premise, any fact in relation to that question would have been a constitutional fact within the purview of the above

discussion, and it would, under the decisions of the Supreme Court, have been proper for the local court to have considered evidence *de novo* with respect to any such fact. In the present case, however, the claim on account of injury outside of the District was *rejected* and no constitutional question could have been urged as to the power of the deputy commissioner to assert the force of the local Act beyond the territorial jurisdiction of the District, because it was not so asserted. The plaintiff below did not raise any question of constitutionality and hence there is in this case merely the question whether or not the deputy commissioner properly applied the local law, it being conceded by the nature of the pleadings that Congress had constitutional authority to provide a workmen's compensation law for this District.

In addition to the *South Chicago Coal Case* the appellees desire to call particular attention to the case of *Shields, et al. v. Utah Idaho Central Railroad Co.*, 305 U. S. 177 (1938). The question there was whether the Interstate Commerce Commission had correctly determined that the plaintiff was a carrier in interstate commerce. This carrier maintained that it was an interurban railway and hence not a carrier in interstate commerce within the statute. In that case, in the lower court, a trial *de novo* was held on the issue whether the plaintiff was an interurban railway, but the Supreme Court reversing the lower court ruled that this was not a fact to be determined by a trial *de novo* for the reason that Congress had the power to include or exclude interurban carriers as it pleased and therefore *its power* to enact the legislation did not turn upon the fact. This is a crucial reason distinguishing the *Shields* case from *Crowell v. Benson* and also showing the plain analogy between the *Shields* case and the present case. The Interstate Commerce Commission had to determine whether a certain railway was, as a matter of fact, a carrier in interstate commerce (other than an electric interurban railway). If the carrier was not such, the Interstate Commerce Commission had no authority to act. It becomes immediately apparent that in the *Shields* case the question was one of *statutory jurisdictional fact*, within the category with respect to which there is no right to trial *de novo*. The deputy commissioner in the

present case, in deciding that Gudmundson did not come within the purview of the local Act, merely resolved a similar statutory jurisdictional fact situation and nothing more. The deputy commissioner had to determine on the facts presented to him whether Gudmundson was an employee of an employer carrying on any employment in the District of Columbia. He found that Gudmundson was not engaged in any work relating to employment in the District of Columbia at the time of injury and therefore *he* did not have authority under the local statute to afford relief. There is no question as to constitutional power of Congress to enact the local law.

Summarizing the above briefly, in order to obtain a trial *de novo* in the District of Columbia the case would necessarily have to turn upon some fact or facts which have a material bearing in the determination of a constitutional question properly raised in the pleadings. Unless such a question is raised there is no right to trial *de novo* on any question, whether it be ordinary-fact question or statutory-jurisdictional question.

It may be commented here that the appellant is seeking a type of judicial review not heretofore recognized. As we understand the decisions of the Supreme Court, there is room for only two types of judicial inquiry upon administrative action: namely, (1) judicial review of the record to determine whether questions of law have been properly resolved, and (2) trial *de novo* where constitutional questions have been raised and constitutional fact questions must be considered. Here the bill of complaint seeks a trial *de novo* and yet in the brief and in the court below plaintiff inconsistently stated that he did not desire a trial *de novo*, but requested the court to consider the record heretofore made, relaxing the rule as to finality of facts; in other words, plaintiff desires the court to reweigh all of the evidence heretofore taken. It does not appear that this request fits any pattern previously considered by the Supreme Court and it is anomalous. In this situation, as a practical matter, if the appellant is entitled to a trial *de novo*, which is denied, he should be given a trial *de novo* since the adjudication of the rights of the parties in a large measure turns upon the credibility of the

witnesses and it is a difficult if not impossible task for a court which has before it only printed words on a page to overrule the findings of a deputy commissioner who has seen and heard the witnesses. In cases of this kind physical presence of the witnesses may be of utmost importance.

The Supreme Court in the case of *Crowell v. Benson*, which involved the constitutionality of the Longshoremen's Act and *constitutional fact* questions, held that the only issues which may be considered by a district court upon trial *de novo* in a case arising under the Longshoremen's Act are (1) whether the injury occurred upon the navigable waters of the United States (a constitutional fact question) and (2) whether the employer-employee relation existed between the parties (a questionable constitutional fact question). *Neither of these issues is involved in the present case nor is there any issue involving determination of a constitutional fact question.* The Supreme Court in the *Benson* case held in effect that with respect to all fact questions other than those relating to constitutional questions the findings of fact of the deputy commissioner, supported by evidence, shall be final. (Any other view of *Crowell v. Benson* is not consistent with the prior and subsequent decisions of the Supreme Court.) For parts of the opinion as reported in 285 U. S. supporting this statement see bottom of page 37, top of page 38 and pages 46, 54, 55, 64 and 65. The finality of findings of fact of a deputy commissioner on all matters at issue before him (except those involving the two constitutional fact questions above indicated) has been restated by the Supreme Court in *South Chicago Coal and Dock Company v. Bassett*, deputy commissioner, 309 U. S. 251 (1940); *Voehl v. Indemnity Insurance Company of North America*, 288 U. S. 162; *Del Vecchio v. Bowers*, 296 U. S. 280, and *Jules C. L'Hote, et al. v. Crowell*, deputy commissioner, 286 U. S. 528.

In *South Chicago Coal and Dock Company v. Bassett*, *supra*, the Supreme Court held that the deputy commissioner's findings of fact on the (statutory jurisdictional) question whether an employee was a "member of a crew" of a vessel within the meaning of the excepting provisions of section 3 (a) (1) of

the Longshoremen's Act, were final and conclusive where supported by evidence.

In *Voehl v. Indemnity Insurance Company of North America*, *supra*, the Supreme Court held that the findings of fact of the deputy commissioner on the (statutory jurisdictional) question whether the injury arose out of and in the course of the employee's employment, within the meaning of section 2 (2) of the Longshoremen's Act, were final and conclusive where supported by evidence.

In *Del Vecchio v. Bowers*, *supra*, the Supreme Court held that the findings of fact of the deputy commissioner on the (statutory jurisdictional) question whether an employee died of self-inflicted wounds were final and conclusive where supported by evidence.

In *Jules C. L'Hote v. Crowell*, *deputy commissioner*, *supra*, the Supreme Court held that the findings of fact of the deputy commissioner on the (ordinary fact) question of dependency of the claimant were final and conclusive where supported by evidence.

The decisions of the Supreme Court subsequent to *Crowell v. Benson* clearly indicate that the tendency of that court is to *restrict* rather than broaden the rule it previously announced. The Supreme Court has never held, and we do not believe it ever will hold, that such rule is applicable to cases arising under the local workmen's compensation law, where no constitutional questions are raised.

The purpose of the Supreme Court in restricting the application of the rule it laid down in *Crowell v. Benson* is not surprising in view of the strong dissenting opinion in that case by Mr. Justice Brandeis, in which Mr. Justice Stone and Mr. Justice Roberts concurred. In this connection the attention of the Court is invited to the scholarly critique of *Crowell v. Benson* in an article entitled "The Doctrine of 'Constitutional Fact,'" written by Arthur Larson, Professor of Law at the University of Tennessee, published in 15 Temple University Law Quarterly 185 (1941). Professor Larson thoroughly analyzes the scope and implications of *Crowell v. Benson*, and makes clear the distinctions between *ordinary fact*, *statutory jurisdictional*

fact, and *constitutional fact* questions for purposes of judicial review. The following excerpts therefrom are very pertinent:

The term "constitutional fact" has not yet found its way into the lexicon of the courts, although it is occasionally used by lawyers and writers. It supplies, however, a much-needed phrase with which to summarize and identify the kind of fact which was isolated for special treatment in *Crowell v. Benson*. The Supreme Court itself furnished no such handy label, for it described this type of fact sometimes as "basic," sometimes as "fundamental," and sometimes as "jurisdictional-but-not-in-the-ordinary-sense." The term "constitutional fact" can best supply this omission.

* * * *

As to such facts it was held that the court below, in a suit to enjoin enforcement of an award, properly permitted complete trial *de novo*, giving no weight either to the findings or to the record made by the administrative commissioner entrusted by the act with the task of finding the facts of the case.

In the nine years that have followed this decision, few writers have had a good word to say for it. In fact, the Court itself is suspected of trying to forget about it, and of omitting to cite or distinguish it even where it is clearly in point—as if it were some youthful indiscretion of which the Court is secretly a little ashamed. Now, one of the disadvantages (or perhaps advantages) of being a Supreme Court is that it is not expected that you will descend into the law review arena to account for your decisions and answer your critics. And so, after nine years the decision is still in a fog as well as under a cloud.

I. VALIDITY OF THE THREE CATEGORIES OF FACT

Before *Crowell v. Benson*, there were only two kinds of fact for purposes of review questions: ordinary fact, and jurisdictional fact. The latter term has had a variety of interpretations and has been used to ac-

comply a variety of results, not all creditable. Since *Crowell v. Benson* we have three categories: ordinary fact, statutory jurisdictional fact, and constitutional jurisdictional fact (or constitutional fact). The definition of statutory jurisdictional fact has been well put by Professor John Dickinson:

"The 'jurisdictional fact' doctrine is that where a statute purports to confer on an administrative agency a power to make decisions, but is construed as conferring that power only over, or with reference to, certain kinds of objects, situations or acts, then the fact question of whether or not in any given case of such a decision the object, situation or act was, *in fact*, of the kind specified in the statute goes to the jurisdiction of the administrative agency to make the decision at all."

A constitutional jurisdictional fact, then, is one upon which would turn the question whether a constitutional, rather than a statutory, limitation of power had been exceeded.

The criticism of the majority opinion most frequently heard is that there is no real dividing line between the two facts segregated by it, and a number of similar facts. Before this question can be argued, we must agree upon what kind of facts the Court was talking about. In spite of its use of such terms as "jurisdictional" and "fundamental", the opinion as a whole shows that it did not intend the holding to apply to jurisdictional facts in general, but only to those having a constitutional basis. The question then is not—is there a valid difference between jurisdictional facts and ordinary facts?, but rather—is there a difference between constitutional jurisdictional facts and both other kinds?

The case of *Crowell v. Benson* must be considered in its setting, that is, in its relation to cases arising under *admiralty* jurisdiction (and cases arising under the Longshoremen's Act

do arise under such jurisdiction), and to cases in which it is specifically pleaded that a constitutional right has been impaired by the action of the deputy commissioner.

The Federal courts, in exercising their admiralty jurisdiction, function as *constitutional* courts: that is, courts administering judicial power expressly vested in them by the Constitution (see Article III, Section 2). *Crowell v. Benson*, in relation to one of the constitutional questions considered, decided that in resisting legislative encroachment upon the domain specifically allotted to them by the Constitution, the so-called constitutional courts may make certain independent fact determinations which bear relation to the power of the legislature to oust the constitutional jurisdiction of the Court. Where the jurisdiction of the court is derived from the legislature alone, under proper legislative enactment, the power of judicial review may be limited *to any extent* by the legislature, and it is not seen how any constitutional question can arise.

In considering applications for judicial review of a compensation order under the District of Columbia workmen's compensation law, the local courts act under the legislative fiat contained in the compensation law, as legislative, rather than as constitutional courts. *Crowell v. Benson*, 285 U. S. 22, 50; *Ex Parte Bakelite Corp.*, 279 U. S. 438, 460. They are aiding Congress in the exercise of its plenary powers and in the discharge of the duties of local government imposed upon it by Article I, Section 8, Clause 17 of the Constitution. Our courts in this respect do not derive their authority directly from the Constitution but from an Act of Congress. While thus acting as legislative tribunals, the local courts, like the courts of a State, have only such judicial power as the legislative branch may grant to them and may exercise such power only within the limits prescribed by Congress.

As has already been noted, Congress did not provide in the local compensation law any provision authorizing judicial review by a proceeding in the form of a trial *de novo* of the findings of fact made by the deputy commissioners under that law. It is generally held that the decisions of the administrative bodies administering State compensation laws shall be final as

to *all* questions of fact (other than constitutional fact questions) and counsel have not found a single case wherein it has been held by a State court under a State workmen's compensation law similar to that in effect in the District of Columbia that there is the right to a trial *de novo* in court on the question of employer-employee relationship or any other question of fact, ordinary or statutory jurisdictional. Numerous decisions declare such administrative findings of fact to be conclusive. The following decisions all dealt with controversies concerning the existence of the relation of employment (statutory jurisdictional): *Hillen v. Industrial Accident Commission*, 199 Cal. 577, 580; 250 P. 570; *York Junction Transfer & Storage Co. v. Industrial Accident Commissioners*, 202 Cal. 517, 521; 261 P. 704; *Index Mines Corporation v. Industrial Commission*, 82 Colo. 272, 275; 259 P. 1036; *Ocean Accident & Guarantee Corp. v. Wilson*, 36 Ga. App. 784; 138 S. E. 246; *Cinofsky v. Industrial Commission*, 290 Ill. 521, 523; 125 N. E. 286; *Churchill's Case*, 265 Mass. 117, 119; 164 N. E. 68; *Matter of Dale v. Saunders Brothers*, 218 N. Y. 59, 63; *Oklahoma Pipe Line Co. v. Lindsey*, 113 Okla. 296, 298; 241 P. 1092; *Belmonte v. Connor*, 263 Pa. 470, 472; 106 A. 787.

In *Dahlstrom Metallic Door Co., et al. v. Industrial Board of New York*, 284 U. S. 594, affirming 256 N. Y. 199, the court sustained the constitutionality of those provisions of the New York workmen's compensation law pertaining to judicial review, which provisions are substantially identical with the corresponding portions of the local compensation law. In that case the court held in effect that for the legislature to give finality to determinations of fact by an administrative board which were supported by evidence, did not violate the due-process clause of the Fourteenth Amendment.

In accord with the weight of authority contained in many cases throughout the United States on this question, it is respectfully contended that the findings of fact of the appellee deputy commissioner *on all questions of fact*, other than those relating to a constitutional question, arising in connection with decisions upon claims should be regarded as final and conclusive upon the Court, if supported by competent evidence, and that the delegation by Congress of the fact-finding power under the

local compensation law to an administrative tribunal does not infringe upon any provision of the Constitution nor does it deprive the local courts of any constitutional jurisdiction vested in them.

The question of right of trial *de novo* under the compensation law has never been squarely passed upon by this Honorable Court although in the case of *Metropolitan Casualty Insurance Company of New York v. Hoage*, deputy commissioner, 63 App. D. C. 307, 73 F. (2d) 175, there is dictum appearing to follow *Crowell v. Benson*. In this earlier local case the deputy commissioner found in a compensation order filed June 29, 1932, that Raymond E. Brown sustained fatal injury on April 5, 1932, while in the employ of one Martha N. Daley. The insurance carrier instituted a proceeding for judicial review of said order and contended in its bill of complaint that "The status of employer and employee did not exist or was in force and effect" at the time of said injury. The bill contained a prayer for a trial *de novo*. The lower court granted such a trial, and after hearing the evidence *de novo* held that "The relationship of master and servant existed between Martha N. Daley and Raymond E. Brown" at the time Brown sustained injuries which resulted in his death; that the compensation order "should be carried into full force and effect," and that the bill of complaint should be dismissed. The insurance carrier perfected an appeal from the final decree of the court in that case. This Court in its opinion incidentally remarked that "The question before us is solely the fact of employment, and, as this fact is an essential condition precedent to the right to make the claim, the proceeding in the court below was, in our opinion, entirely proper," citing the *Crowell v. Benson* case. In that case the insurance carrier did not assign as error the action of the court below in granting trial *de novo*. No question was raised on appeal in this case relative to the action of the lower court in granting a trial *de novo*, and no argument on this point was presented to this court on any such question. That portion of the opinion of this court quoted above, it is submitted, should be regarded as *obiter dictum*.

In *Georgia Casualty Co. v. Hoage*, deputy commissioner, 61 App. D. C. 195, 59 F. (2d) 870, this Court held that the insurance carrier waived any right it may have had to have this Court grant a trial *de novo* where no request for such a trial was made in the lower court. Similarly this decision affords no basis as a precedent.

II

Deputy Commissioner properly found from the evidence that appellant's claim did not come within the purview of the District of Columbia workmen's compensation law

(a) Extraterritorial provision of the District of Columbia workmen's compensation law not controlling

The District of Columbia workmen's compensation law is a compulsory type of law. It applies in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia "irrespective of the place where the injury or death occurs."

The extraterritorial provisions of the Maryland workmen's compensation law appear to relate only to salesmen and sales managers and have no application in the present case. With respect to certain types of hazardous employment, the employment in which Gudmundson was engaged when injured at the Bethesda job being of such type, the Maryland law is also a compulsory form of law. See Annotated Code of Maryland, Volume 2, Flack's Edition (1939), Article 101. With respect to work that is not classified as hazardous, the Maryland law is elective.

The extraterritorial application of workmen's compensation laws of the several States has been the source of prolific litigation. The whole subject of workmen's compensation legislation as a substitute for common-law rights and remedies was discussed at great length by the United States Supreme Court in the case of *New York Central Railroad Company v. White*, 243 U. S. 188. In that case the Supreme Court stated that the scheme of compulsory compensation legislation was that of a substitute for common-law rights and remedies and that

such legislation was founded upon the exercise of the *police power* of the State. See also in this connection *Mountain Timber Company v. Washington*, 243 U. S. 219, 243.

The District of Columbia workmen's compensation law is neither elective nor contractual in its nature, but is statutory and compulsory and is based on the exercise by Congress of its plenary police power over the District of Columbia. The law operates *upon the status of employer and employee* in "any employment" in the District of Columbia; and hence, no contract, express or implied, made within or without the District of Columbia can of itself affect the rights and duties which the law places upon such status.

In the present case as respects the Bethesda job on which Gudmundson was working at the time of the injury, it is clear from the evidence that the employer was carrying on no employment in the District of Columbia, within the meaning of the District of Columbia workmen's compensation law. It is not disputed that at the time of Gudmundson's injury his employer, the Senn-Herrick Corporation, did not maintain an office in the District of Columbia except a temporary one at the location of the project while engaged in construction work in the District of Columbia; that the employer was a foreign corporation with its principal place of business in the State of New York; and that all matters relating to the Bethesda job were handled either in Bethesda or in New York. Gudmundson went to work at Bethesda, Maryland, on or about March 1, 1939, and had been working at the National Institute of Health, a major project, almost three months when he sustained injury on May 25, 1939. During this period there was only one occasion when he returned to the District of Columbia and *worked less than half a day* on the Mellon Art Gallery job (Appellant's App. 33). Counsel for appellant in their brief play up this lone, isolated incident in an effort to show the Court that the employer was carrying on employment in the District of Columbia at the time of Gudmundson's injury. It is submitted that there is clearly no merit to appellant's argument on this point. The Mellon Art Gallery job was entirely separate and distinct from the Bethesda job. The evidence shows that carpenters have no regular employer. They are hired for the

"particular job" and when the job is done they are laid off. (Appellees' App. 44). No injury was sustained by Gudmundson when he performed a few hours work on the Mellon Art Gallery job.

Under appellant's theory if an employee prior to injury in a foreign jurisdiction has performed a few hours' labor in the District of Columbia the local law applies, notwithstanding the fact that the employee was engaged on a major operation at a fixed place of employment in another State at the time of injury.

(b) Contract theory

A great deal of confusion exists in the reported decisions from the uncritical use of the premise that workmen's compensation laws should be regarded as a "part of the contract" between an employer and his employee. It appears that the so-called "contract theory" evolved from the construction of, and has been held as of controlling importance with respect to, the elective type of compensation law. In discussing this subject in *Pierce v. Bekins Van and Storage Co.*, 185 Iowa 1346; 172 N. W. 191 (Iowa 1919), the Supreme Court of Iowa said:

Our statute is confessedly elective. We are told that no distinction in construction is to be based upon whether the act is compulsory or elective. That is true as to some provisions of compensation acts. But that the statute is elective has controlling bearing on one thing that is most highly important. Where the statute is elective as to both employer and employee, payment of compensation is not the performance of a statute duty, but the performance of conditions in the contract requiring which conditions are in the contract by means of reading the compensation statute into the contract.

With respect to the application of the District of Columbia workmen's compensation law, the so-called "contract theory" was not followed by this Court in the case of *United States Casualty Company v. Hoage, deputy commissioner*, 64 App. D. C. 284, 77 F. (2d) 542, the so-called *Stamps* case, where

the situation was converse to that in the present case. In the *Stamps* case this Court said that "The liability under the Workmen's Compensation Act is not for tort, but is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise." Since this Court in the *Stamps* case held in effect that the "contract theory" is not controlling with respect to cases arising under the local compensation law, extended discussion of this theory is not necessary. In the *Stamps* case the contract of employment was made in the State of Alabama. The injury occurred in the District of Columbia, and this Court held that the injury came within the purview of the local compensation law.

(c) Status theory

In general, and particularly with respect to compulsory workmen's compensation laws, it may be said that jurisdiction under such legislation rests upon the *status of the parties* and not upon an implied contract; it is neither *ex contractu* nor *ex delicto*. In *Cudahy Packing Company v. Parramore*, 263 U. S. 418, the Supreme Court, speaking through Mr. Justice Sutherland, said: "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract." This case was cited with approval in *Bountiful Brick Company v. Giles*, 276 U. S. 154.

The most illuminating case which counsel have found on this subject is that of *Ocean Accident & Guarantee Corporation, Ltd. v. Industrial Commission of Arizona*, 32 Ariz. 275, 257 Pac. 644, decided by the Supreme Court of Arizona on June 27, 1927, to which the court's attention is particularly invited. In that case the employee was employed at Yuma, Arizona, by a general contracting firm under a contract of employment entered into in California. While engaged in constructing a building at Yuma, the employee was injured. The petitioner insisted that the award should be made in accordance with the workmen's compensation law of California. The petitioner's position was based upon two propositions: first, that "workmen's compensation laws are based on the theory that when a contract of

employment is entered into the parties have agreed that the law shall become a part of the contract", and second, that "even though the Arizona authorities are not bound under the rules of comity and as a matter of common law to adopt this theory, the Arizona Workmen's Compensation Act itself, in section 59, expressly limits the right to recover in cases like this to the compensation law of the State where the contract of employment was made."

In meeting and disposing of these propositions the court said:

And many a court has, following the form, based its construction of these acts (compensation acts) on the theory that they were essentially a part of a contract between the employer and employee, and from this premise, true in form, but false in substance, have flowed many results logical enough had the premise been true but utterly false when the true theory of the laws is considered.

* * * * *

In these two cases (referring to *N. Y. Central v. White*, and *Mountain Timber Co. v. Washington*, cited above) the highest tribunal in the land, which, contrary to the view held by some who have not followed its decisions closely, is always in the van in its recognition of new conditions requiring a revision of archaic ideas of law, discarded the old fiction that compensation acts must be based ostensibly on contract and justified them by the police power of the State.

* * * * *

This Act (Arizona compensation law) so far at least as the employer is concerned, is compulsory in its nature; he has no option as to whether he shall accept or reject it and the whole language both of the constitutional amendment authorizing it and of the act itself shows clearly that they were based, not on the old theory of contract between the parties, but upon the inherent right of the State, recognized by the Supreme Court of the United States in the cases above cited, by virtue of its police power to establish certain rules reg-

ulating the status of employer and employee. We therefore hold that the present Arizona Workmen's Compensation Act is neither elective nor contractual in nature, but, on the contrary, that it rests upon the police power to regulate the status of employer and employee within the State of Arizona, and that no contract, express or implied, made within or without the State of Arizona, unless expressly so authorized by our law, can of itself affect the rights and duties of such status. It is governed, so far as this subject is concerned, solely by the provisions of the Arizona statutes, and nothing else.

As regards the work on the Bethesda job, it is clear from the evidence that Gudmundson had no "status" as an employee in the District of Columbia.

(d) Contract of hire made in the State of Maryland

In the present case appellant contends that the contract of hire was made in the District of Columbia. The deputy commissioner found that such contract was made in the State of Maryland and his finding on this point is supported by the evidence, and should, therefore, be regarded by the Court as final and conclusive. The evidence as to the place where the contract of employment was made is conflicting. It appears from the evidence that Mr. Lenck, Gudmundson's foreman, called at the latter's home in the District of Columbia and told him that work on the Bethesda job had begun and asked Gudmundson whether he would like to go to work there the following morning. Next morning Gudmundson reported to the Bethesda job and was put to work. John J. Jackson, assistant superintendent, testified that Gudmundson was not hired until the morning he was *put to work* in Bethesda, saying that "He would never draw his pay until he reaches the job and starts to work." (Appellees' App. 48); that somebody has to "sign him up on the job" (Appellees' App. 46). Ralph Lenck, foreman, also testified that the carpenters are hired right on the job (Appellees' App. 42). The offer of employment was made in the District of Columbia and apparently accepted in the State of Maryland.

(e) Law of place where contract is to be performed and where employment is localized applies

Conceding, *arguendo*, that the contract of hire may be regarded as having been made in the District of Columbia, such fact under the foregoing authorities and those cited below would not be regarded as controlling, because Gudmundson never performed any duties with respect to the Bethesda job in the District of Columbia; and as regards such job, he never acquired a status of an employee of an employer carrying on employment in the District of Columbia. If we assume that the contract of hire was made in the District of Columbia, there is only one other element which might be argued would tend to support jurisdiction under the District of Columbia workmen's compensation law, and that is the fact that Gudmundson was a resident of the District of Columbia.

The following factors are against jurisdiction under the local law: (1) the employer was a foreign corporation with its principal place of business in the State of New York; (2) the contract of hire was to be performed exclusively in the State of Maryland; (3) the employee was engaged in an employment to be performed wholly at a fixed place of employment in the State of Maryland; (4) the injury occurred in the State of Maryland; and (5) plaintiff sought and obtained recovery of compensation under Maryland law.

Under the clear weight of authority this case does not come within the purview of the District of Columbia workmen's compensation law.

A lengthy review of the pertinent authorities will be found in *James B. Watts v. James G. Long*, 116 Neb. 656, 218 N. W. 410, 59 A. L. R. 728. In that case an employer, who was a resident and had his principal place of business in Kansas, was engaged in paving highways in that State and in Nebraska under contracts with municipalities. Upon completion of his last contract in Nebraska, he entered into a contract in that State with an employee to go to Kansas and work upon contracts for paving there, and to return to Nebraska if the employer secured other contracts in Nebraska in the future. The employee sustained injury while work-

ing in Kansas, and claimed compensation under the Nebraska workmen's compensation law. It will be seen that the facts in the *Watts* case are strikingly similar to those in the present case. It was held by the Supreme Court of Nebraska: (1) that at the time of the injury the employer was not conducting any industry in Nebraska; (2) that the work of the employee was not an incident to any industry carried on in Nebraska; and (3) that the Nebraska compensation law did not apply to the case.

The subject is treated at great length in *American Mutual Liability Insurance Company v. McCaffrey*, 37 Fed. (2d) 870 (C. C. A. 5, 1930), certiorari denied, 281 U. S. 751. In that case the Chattanooga Boiler and Tank Company, a Tennessee corporation engaged in the manufacture of tanks used by oil companies (which at times under its contract it would erect for its customers), sold a tank to be erected in Engleside, Texas. On or about April 15, 1928, at Chattanooga, Tennessee, it employed appellee, one McCaffrey, as a boilermaker to go to Engleside, Texas, in order to assist in the erection of the tank. McCaffrey did no work in Tennessee, and it was not contemplated in his employment that he should. He proceeded to Texas and while so employed there on May 10, 1928, received an injury to his eye for which suit was brought under the Texas workmen's compensation law. The insurance carrier contended that because the contract of employment was entered into in the State of Tennessee, appellee's right to recover was solely under the compensation law of that State. The court held that this contention was without merit. Both the Tennessee and Texas compensation laws contain provisions purporting to give them extraterritorial effect. The court said that:

* * * At the present day, most states, under their police power, have adopted workmen's compensation laws for the benefit of the laboring classes, and to remove the uncertainties and economic suffering incident to injury and death in industry, by equalizing the burden between employer and employee. This policy has likewise been adopted by the national government with

respect to interstate commerce and in the public service. *However, it is fundamental that in doing so a state is confined to transactions and relations over which it has territorial jurisdiction, for it would seem clear that no one of them could conclusively declare what the rights of its own citizens or those of such citizens and nonresidents should be in matters arising wholly within another state especially if the attempted provisions were in conflict with the positive law of the other state.* [Italics supplied.]

* * * * *

We shall not indulge in a discussion of nor attempt to differentiate the many cases cited by counsel from state courts, as some of them appear to support one side and some another. *We prefer to cling to the well-recognized principle that a contract made in one state, to be wholly performed in another, as to remedies, is governed by the law of the state where the performance is had.* And in the absence of clear proof to the contrary, it will be presumed that the parties intended such agreement to be controlled thereby. 13 C. J. p. 259, verbo "Contract," section 32. [Italics supplied.]

In *McKesson-Fuller-Morrison Company v. Industrial Commission*, 250 N. W. 396, 212 Wisc. 507 (1933), the court said:

* * * The place where the contract is made is not controlling. *Whether the employee be a resident of this state is not material.* The controlling and decisive factor is whether he had a status as an employee within this state * * *

* * * * *

We can do no more than emphasize what we think plainly appears from the cases above cited, that in all cases where compensation is sought under the circumstances such as these, *the dominant consideration is whether the employee had obtained the status of an employee in this state, a status which may be attained by rendering service in this state to one who is under the workmen's compensation act of this state.* Having attained that status, an injury sustained while absent

from the state on a mission incidental to his main employment in this state, will be compensated under our act. [Italics supplied.]

The courts in the State of Texas for years followed the "contract theory" in construing the compensation law of that State, but the Supreme Court of Texas apparently abandoned that theory in the recent case of *Southern Underwriters v. Gallagher*, 51 Tex. 136, 136 S. W. (2d) 590 (Tex. 1940), where it was held (syllabus):

One who occupies status of a Texas employee is entitled to protection under the Texas compensation statutes, though he was working outside of the state at time of injury, whereas, if he is hired in the state to go out of the state to perform labor or services, he is not entitled to protection under the Texas compensation statutes merely because the contract was entered into in the state.

The Court said:

We have given the questions above discussed unusual consideration because of their importance to Texas workmen, employers, and compensation insurance carriers. We are fully aware of the rule that our workmen's compensation law should be liberally construed in favor of Texas employees. In spite of this rule, we cannot bring ourselves to the conclusion that it is the intent or purpose of such law to extend its protection to an employee injured in a foreign state, *where the undisputed facts show that such employee never, in any sense, occupied the status of a Texas employee prior to leaving the state.* [Italics supplied.]

The case of *Sherk v. Department of Labor and Industries*, 189 Wash. 460, 65 Pac. (2d) 1269 (Wash. 1937), is directly in point. There the Supreme Court of Washington held that an employee engaged in construction work outside the State of Washington, in the State of Oregon, and which was not incidental to any business carried on by the employer in the State of Washington, was not entitled to compensation under

the Washington compensation law for an injury sustained in Oregon, *even though the employee was a resident of Washington and his employment was secured at an office of the employer maintained for that purpose in Washington.* The court in distinguishing other cases, said:

Here, while the appellant was a resident of Washington, his employers were not engaged in any business in the state covered by the Workmen's Compensation Act. The mere fact that appellant was hired in the state of Washington would not bring this employment under the act; he was not employed to do any work in the state but to work exclusively on a job lying wholly within the limits of the state of Oregon, his employment being in no way incidental to a business carried on within the state of Washington.

That his employment to work on the Sand Island job was had at an office maintained, for the purpose, by the employer on the Washington bank of the river, is no more material to the issue than if he had been employed through a labor agency in the City of Seattle. His contract was for services wholly without the state.

Accord:

Schooley v. Industrial Commission, 233 Wis. 631, 290 N. W. 127 (Wisc. 1940);

Pound v. Goulding, 237 Ala. 387, 187 So. 468 (Ala. 1939);

Severson v. Hanford Tri-State Airlines, Inc., 105 Fed. (2d) 622 (C. C. A. 8, 1939);

Tripp v. Industrial Commission of Colorado, 89 Colo. 512, 4 Pac. (2d) 917 (Col. 1931);

Leader Specialty Co. v. Chapman, 85 Ind. App. 296, 152 N. E. 872 (Ind. 1926);

A. M. Platt, Inc. v. Reynolds, 86 Colo. 397, 282 Pac. 264 (Col. 1929).

In the case of *Cameron v. Ellis Construction Co. et al.*, decided by the New York Court of Appeals on January 7, 1930, 252 N. Y. 394, 169 N. E. 662, which is regarded by the New

York courts as a pivotal case, a clear statement of the scope of the rule which is followed in that State, as giving jurisdiction outside New York (work at a "fixed place"), is given. This case followed the *New York Central v. White* case, *supra*, with respect to the theory of the workmen's compensation law, the court saying:

Obligations and rights under the statute are not elective. They rest upon the command of the state, and not upon agreement of the parties. The concept of a "constructive contract" to assume obligations which are created by law is open to criticism.

The court then proceeds to discuss the extraterritorial question and the rule above referred to, saying:

When the course of employment requires the workman to perform work beyond the borders of the state, a close question may at times be presented as to whether employment itself is located here. Determination of that question may at times depend upon the relative weight to be given under all the circumstances to opposing considerations. The facts in each case, rather than juristic concepts, will govern such determination. Occasional transitory work beyond the state may reasonably be said to be work performed in the course of employment here; *employment confined to work at a fixed place in another state is not employment within the state, for this state is concerned only remotely, if at all, with the conditions of such employment.* Such illustrations may indicate the manner in which the test should be applied; we do not now attempt a more definite classification intended to cover all the varying circumstances that may enter into the question in other cases. [Italics supplied.]

The same principle was applied in *Kalfastis v. Commercial Printing Company*, 254 N. Y. S. 519, 233 App. Div. 649 (1931); and in *Baum v. New York Air Terminals*, 245 N. Y. S. 357, 230 App. Div. 531 (1930), the facts in which cases are directly in line with those in the present case.

Under the decisions construing the New York workmen's compensation law the present case would not be compensable under the District of Columbia workmen's compensation law, because at the time of the injury the employee was engaged in a major operation at a fixed place of employment in the State of Maryland.

(f) United States Supreme Court Decisions

It may be contended that the decisions of the Supreme Court of the United States in four cases which will be hereinafter referred to have the effect of modifying or changing the rules and principles relating to the scope and application of the so-called doctrine of extraterritoriality as set forth in the state cases cited above and that such authorities should no longer be regarded as controlling. There appear to be, however, distinguishing features in each of the several cases which the Supreme Court has decided relating to this subject.

In all of the cases decided by the Supreme Court there was involved the construction and application of the full faith and credit clause of Article IV, Section 1 of the Federal Constitution. In this connection the appellee, Travelers Insurance Company, interposed no defense before Deputy Commissioner Cardillo that the full faith and credit clause applies in the present case and that the Court should give conclusive effect to the Maryland law, and no contention was apparently made by appellant before the Maryland Industrial Commission that under the full faith and credit clause it should give conclusive effect to the District of Columbia law. Strictly speaking, therefore, no constitutional question is involved in the present case, and the decisions of the Supreme Court have no special application.

The first case to reach the Supreme Court involving this subject was that of *Bradford Electric Light Company, Inc. v. Clapper*, 286 U. S. 145. In that case the principal place of business of the employer was in Vermont. The employer's electric lines extended into New Hampshire. Clapper, a resident of Vermont, was employed as an emergency lineman for service in either state and was killed while on a temporary emergency call in New Hampshire. The Vermont Workmen's

Compensation Act, which was elective, provided that a workman hired within the State would be entitled to compensation even though injured outside the State and that the remedy under the Vermont Act should be regarded as exclusive. The New Hampshire law allowed the employee to elect to sue for damages at common law, as modified by the Employers' Liability Act, or to claim compensation. When the decedent's administratrix elected to sue under the New Hampshire Employers' Liability Act, the defendant interposed a defense that the remedy under the Vermont Act was exclusive and entitled to full faith and credit. The Court held, first, that a State which had jurisdiction over the status of an employee could take jurisdiction over any claims arising from injuries sustained outside the State, and secondly, that under the circumstances of the *Clapper* case the Compensation Act of Vermont was entitled to full faith and credit wherever suit was brought. The administratrix was accordingly remitted to her remedy under the Vermont workmen's compensation law.

The decision in the *Clapper* case appears to have little, if any, application to the present case, because of the different factual situation. Both Clapper and his employer were residents of Vermont, and the employer's place of business was in Vermont and the contract of hire was made in that State, and, moreover, at the time of injury Clapper was performing merely temporary duties in New Hampshire, such duties being incidental to his main employment in Vermont. In the present case the employer was not a resident of the District of Columbia, and with respect to the Bethesda job, it was not carrying on any employment in the District of Columbia; the employee's contract of hire was consummated in Maryland; his injuries were sustained in that State while working on a major operation at a fixed place of employment; and his employment was not incidental to any business of the employer in the District of Columbia. Moreover, the compensation laws involved in the *Clapper* case were the elective type of laws and there were important differences in the nature of the remedies under such laws. In the present case there appears to be no material conflict in the Maryland law and the

District of Columbia law except that greater benefits are provided under the District law.

The next case to reach the Supreme Court involving this question was that of *Ohio v. Chattanooga Boiler and Tank Company*, 289 U. S. 439, decided by the Supreme Court on May 22, 1933. This case likewise involved the application of the full faith and credit clause under the Federal Constitution. Both the employer and employee were residents of Tennessee. The employee was hired there to work in other states and was killed on a temporary job relating to the erection of a tank while in Ohio. The widow claimed compensation in Ohio though the decedent had elected to come under the Tennessee Act. The Ohio State Insurance Fund, having paid an award to the widow, sued the employer for reimbursement, and the employer invoked the full faith and credit clause to invalidate the proceeding under the Ohio law, contending that since the deceased was hired in Tennessee, the claim for compensation could properly be brought only there. It was held in this case that the full faith and credit clause was not applicable to defeat the jurisdiction of the Ohio Commission since the remedies provided by the Tennessee Act, as construed by the Supreme Court of Tennessee, were not exclusive. This decision apparently narrowed the inquiry of the court, where the full faith and credit clause was invoked, to the single question whether the workmen's compensation law of the foreign state, as construed by the highest court of that state, contains a clause excluding all other remedies under the laws of other states. The decision in this case does not appear to have any special application to the present case; if anything, it supports the award to appellant by the Maryland Commission.

The next case considered by the Supreme Court was that of *Alaska Packers' Association v. Industrial Accident Commission of California*, 294 U. S. 532. In that case a non-resident alien was hired in California by an employer doing business in California to work in Alaska during the salmon canning season. The contract of employment called for his transportation to Alaska, some three thousand miles from California, for seasonal employment of between two and three

months, at the conclusion of which the employee was to be returned to California where he was to receive his wages. The employee, having sustained an injury in Alaska, filed claim in California where an award was made in his favor and sustained in the Supreme Court of that State. The employer contended before the United States Supreme Court that both the due process clause and the full faith and credit clause denied to the State the power to apply its own law to the exclusion of the Alaska Act in fixing and awarding compensation for the injury. The compulsory California Act gave the State Commission jurisdiction over all claims arising from injuries suffered outside the State by employees hired within the State, but did not purport to exclude other remedies. The elective Alaska Act likewise had no "exclusive jurisdiction" clause. The Supreme Court first decided that the extraterritorial provision of the California Act did not violate the due process clause, and turning to the other issue in the case, namely, whether the California courts, despite the valid provisions of their own Act, were required to subordinate their law to that of Alaska, the Court said: "Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted," the court holding that the full faith and credit clause did not require the California courts to give conclusive effect to the Alaska Act.

It is not believed that the decision in the *Alaska Packers' Association* case is controlling in the present case for a number of reasons. Had the Supreme Court in that case held otherwise, the injured employee would have had no remedy, the Court pointing out that (p. 542) "The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state." No such situation exists in the present case because the workman's compensation law of Maryland provides an adequate remedy; in fact, the employee has already been paid compensation

under that law, and the possibility of his becoming a public charge in the District of Columbia is not alleged.

The Supreme Court also said in the *Alaska Packers' Association* case that (p. 541) "Obviously, the power of a State to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences." In the present case the status or relationship of employer and employee did not exist in the District of Columbia with respect to the employment in which the employee was engaged at the time of injury. Such status was created in the State of Maryland where the work was to be performed. In the *Alaska Packers' Association* case the status of employer and employee was created in California in that the employer was doing business in that state, the contract of hire was made in that state and provided for transportation of the employee to Alaska and return after completion of the seasonal work there. The Supreme Court in this case laid down the rule that where there is a conflict between the statute of the forum and the foreign statute it "is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the *governmental interests* of each jurisdiction, and turning the scale of decision according to their weight." [Italics supplied.]

The last case in which the Supreme Court had an opportunity to give further consideration to the subject was that of *Pacific Employers' Insurance Company v. Industrial Accident Commission of California*, 306 U. S. 493, 59 S. Ct. 629, where the situation was converse to that existing in *Alaska Packers' Association v. Industrial Commission of California*, *supra*. In that case a Massachusetts employee of a Massachusetts employer was injured while temporarily employed in California and had incurred medical and hospital expenses in that State. The California statute required payment of compensation, including claims for medical, hospital, and nursing services by California residents, and provided that "no contract, rule or regulation" should exempt the employer from liability. It was held that the full faith and credit clause of the Federal

Constitution did not require California courts to recognize the Massachusetts compensation statute as providing the exclusive remedy, where to do so would require physicians and hospitals to prosecute their claims in Massachusetts. The Supreme Court said that it "must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state." The court further said:

* * * Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured therein. *Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.* [Italics supplied.]

It will be seen from the foregoing that in the *Alaska Packers' Association* case the Supreme Court held, in effect, that the state where the contract of hire was made and the employer resided had a superior governmental interest, but in the *Pacific Employers' Insurance Company* case the state where the employee was temporarily employed and sustained injury was held to have a superior governmental interest.

(g) The *Stamps* case

The only judicial pronouncement on the application of the full faith and credit clause with respect to the workmen's compensation law of the District of Columbia is contained in the case of *United States Casualty Company v. Hoage, deputy commissioner*, 64 App. D. C. 284, 77 Fed. (2d) 542, decided by this Court on April 15, 1935, the so-called *Stamps* case.

This Court in that case, as well as the Supreme Court in *Pacific Employers' Insurance Company v. Industrial Commis-*

sion of *California, supra*, the last case decided by the Supreme Court on this subject, found in effect that the state in which the employee was working and in which the injury was sustained, had a superior governmental interest, and, therefore the award in such state was held to be proper. By analogy, therefore, these cases support the contention that the award in the present case under the Maryland workmen's compensation law, the state where the employment was carried on, and the injury was sustained, was proper, particularly since as regards the Bethesda job, there was no "employment" in the District of Columbia.

Appellant relies upon *Moyer v. Cardillo*, deputy commissioner, — App. D. C. —, 119 F. (2d) 785, decided February 24, 1941. Unlike the present case there was in the *Moyer* case evidence clearly showing that the employer was carrying on employment in the District of Columbia at the time of the employee's injury, and that the employee was injured while engaged in such employment.

CONCLUSION

For the foregoing reasons the appellees urge that the order of the lower court dismissing the complaint be affirmed and that the appeal herein be dismissed, with cost to appellees.

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APPENDIX

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EXCERPTS OF TESTIMONY TAKEN BEFORE THE DEPUTY
COMMISSIONER

EVERETT M. GUDMUNDSON, the claimant, testified as follows:

58 Cross-examination by Mr. SWINGLE:

Q. Who was in charge of this job at the Government Printing Office?—A. Ellis Anderson.

Q. Was he the contractor on the job?—A. Foreman.

Q. Who was the contractor?—A. McCloskey.

59 Q. And Mr. Lenck was just working with his tools at that time?—A. That is right.

Q. And that day, he was working with his tools when he asked you if you wanted to come out to work for the Senn-Herrick Construction Company?—A. We had a conversation to that effect; he asked me if I would like to go at that time. He came to my house, and I was ready.

Q. Did you know Mr. Lenck before?—A. I worked for him down at the Mellon Art Gallery until that job was finished up.

Q. Now, Mr. Gudmundson, you are not maintaining here, are you, that you were on the regular pay roll of the Senn-Herrick Construction Company for a good many years?—A. No, no.

Q. In other words, when they had a job and they could use you, you would go out there and work for them; isn't that so?—A. That is right.

Q. And the Senn-Herrick Construction Company is a New York construction company, isn't it?—A. That is right.

Q. They never have maintained a regular office here in any office building, have they?—A. Whenever they have a big job they have an office here; I guess they have an office on the job, or something like that.

60 Q. They have a shack on each job and no other office other than that in Washington, D. C.?—A. No, sir.

Q. Now, those jobs that you went to work on, are those what you would call major operations, that is, construction work on some real estate there, is it not?—A. That was the main buildings, two big-sized buildings.

Q. And constructing two large buildings out there, that was the job?—A. That is right.

Q. I think that is all.

* * * * *

68 Q. Now, when did you report to the Bethesda job?—

A. The next day. The very next morning.

69 Q. February 24?—A. Yes.

Q. What time?—A. The starting time, seven-thirty.

Q. Did you start to work immediately?—A. Yes, sir.

Q. Right after you got there?—A. Yes, sir. There was a doubt in my mind as to whether it rained that day or the day after Lenck told me to come to work as soon as I was able to.

Q. The first available date?—A. That is right.

* * * * *

71 Q. When you were working out there at Bethesda, where did you get paid; at Bethesda?—A. Yes, sir.

CARL DALQUIST, carpenter, testified on behalf of the claimant as follows:

88 Q. Do you know that it is unusual for contractors to employ carpenters for only one job and have them re-

89 port to various parts of the city or various parts of the country?—A. Well, my experience is when I am working for one contractor and they move from one locality to another, I have to wait until pay day in that locality; I mean that I had to wait until pay day. For instance, once I was moved from New Jersey down to the District of Columbia, and I got part of my pay for the week that I earned in New Jersey.

Q. But you had to wait for the regular pay day before you got your New Jersey pay?—A. Yes.

Cross-examination by Mr. SWINGLE:

Q. Have you always worked for the Senn-Herrick Construction in the last fifteen years?—A. No; I worked for them the first time in 1938.

Q. In 1938? How many jobs have you been on?—A. I have been on three different jobs. The first one was in 1938.

Q. In 1938?—A. Yes.

Q. Have you been working for them constantly since 1938 without working for anybody else during this period?—A. No; I worked from November to January 1938 to 1939, for another contractor.

Q. Who was that?—A. Hadley Company, Philadelphia.

90 Q. Now, when you were working out in Bethesda, was your envelope sent to you out in Bethesda?—A. When I was working.

Mr. SWINGLE. That is all.

Redirect examination by Mr. WILSON:

Q. When you were working out at the Mellon Art Gallery job, was your envelope handed to you at the Mellon Art Gallery, or would you get your envelope out at Bethesda?—A. They would come down and we would get it.

RALPH LENCK, a carpenter foreman, testified on behalf of the employer and insurance carrier as follows:

Direct examination by Mr. SWINGLE:

92 Q. Mr. Lenck, by whom are you employed now?—
A. Senn-Herrick Construction Company.

Q. You have been employed by them since when?—A. I have been employed since five years ago. I don't remember exactly.

93 Q. In New York?—A. Yes.

Q. What is your employment with them now?—
A. Carpenter foreman of the Mellon Art Gallery.

Q. Is that the same position you had when you went to work, as I understand it, at Bethesda on the hospital job?—
A. Yes, sir.

Q. This Senn-Herrick Construction Corporation is a New York corporation, I believe, is it not?—A. 300 Madison Avenue, New York.

Q. That is the only office they have?—A. That is the only office they have.

Q. They never had an office in Washington, D. C., or Maryland?—A. No.

Q. Do you remember a man named Mr. Gudmundson?—
A. Yes, sir.

Q. How long have you known him?—A. I have known him for approximately three years.

Q. And where did you meet him?—A. The first time at the Mellon Art Gallery.

Q. He came to work under you at that time?—A. I hired him on that job as a carpenter.

Q. That was around about February 1938, wasn't it?—A. I believe it was, the latter part of February.

Q. Now, how long did he work there?—A. He worked the latter part of September, I believe, the latter part of September, yes.

Q. The latter part of September 1938?—A. Yes.

Q. And then when he left, do you know where he went then?—A. He went to work for McCloskey Construction Company on the Government Printing Office, Washington, D. C., as far as I know.

Q. Of course, at that time he was not working for the Senn-Herrick Construction Company?—A. No.

Q. He stayed with the McCloskey Company for how long?—A. Until about a year; he worked for the McCloskey Company up to the first part of April.

Q. That is approximately?—A. Approximately.

Q. You were working at the same time, were you not?—A. I was working at the McCloskey Company about three weeks previous to the time that he was working there; I quit before.

Q. In other words, you were working for several months for the McCloskey Company and then about—A. (Interposing.) I got sick and I got another type of work. I got sick on the job. I did not go back to McCloskey any more.

95 Q. How long were you sick?—A. The biggest part of February.

Q. The most of February?—A. Yes.

Q. Well, where did you go then?—A. I went out to Bethesda, Maryland, working for the Senn-Herrick Construction Company.

Q. How come you happen to go out there?—A. I was supposed to go out and take charge of the job.

Q. Who called?—A. Mr. Mack, the superintendent.

Q. Mr. Who?—A. Mr. Mack.

Q. Is he the man who usually calls people to go out on the job there?—A. Yes; he is the superintendent on the job I have been working on, and I was in connection with him two or three times a month or once a week, and I saw him quite often.

Q. Does he do all the hiring out there or does the assistant superintendent sometimes do it?—A. No; he hires the carpenter foremen, engineers, superintendents, and whatever he needs.

Q. He hires all those on the job?—A. Yes.

96 Q. How about the other men, laborers, carpenters, ironworkers; who hires them?—A. The carpenter foreman hires his men and the labor foreman hires his men.

Q. Do they have some way of checking in when they are hired? How is that done?—A. Most of the time the carpenter foreman goes out on the job to look for men, men who are on the street, men that he wants to hire, and he takes most of them off the street that he wants to work for him and tells them to show up at work the next morning. When he shows up on the job the next morning his Social Security number is taken, his age, his address, if he is married, and so on. It is taken up by the superintendent and the timekeeper on the job.

Q. If a man comes out there and he is giving information and his qualifications do not seem to be right, I suppose he is not hired then, is he?—A. No qualifications are asked for—

Q. (Interposing.) All this information that he gives out, what is the purpose of that?—A. For checking in case of accidents. That record lets us know where he lives, his Social Security number, insurance information, and so forth and so on. That is a thing I cannot answer, the purpose of that—for bookkeeping or anything else.

97 Q. Men are officially hired right on the job; is that correct? They are hired right on the job eventually?—A. Yes, sir.

Q. Suppose ten or twelve men would report there for work and you only needed, say, three or four, would you hire the whole ten or twelve?—A. If I only need ten, I only ask for the men that I want.

Q. Have you always hired every man who has come out to the job?—A. What is the question?

The REPORTER (reading):

“Q. Have you always hired every man who has come out to the job?”

The WITNESS. Yes.

By Mr. SWINGLE:

Q. Did you ever have any change in the plans or anything that happened to the job so as to change the conditions so that the men would come down out there and you would not hire them?—A. If I would tell a man to come to work and start in the morning and he came to work in the morning and I was not ready, he would have to wait.

Q. With respect to Mr. Gudmundson, what happened in his case? When did you first speak to him about anything out there?—A. When I heard the McCloskey job was finished and I heard he was going to return from the job out in Bethesda, I asked Mr. Gudmundson if he would want to come to work for me when I went out there, and he said yes at that time.

Q. At that time you were working with your tools as a carpenter, the same as he was?—A. Yes, sir.

Q. You were not working for the Senn-Herrick Construction Corporation at that time?—A. No, sir.

Q. Was the result of that conversation with Gudmundson later on that he came out to the job?—A. No; I went out on the job the first day. The following evening I went out to Mr. Gudmundson's house and told him the work was ready to go on and would he like to come to work the following morning.

Q. Did you go to the houses of any other men and ask them on that morning?—A. Yes; I did.

Q. How many?—A. One more.

Q. Since 1930 your employment with the Senn-Herrick Construction Company has been continuous, or has it not?—

A. No.

99 Q. The Senn-Herrick Construction Company has jobs, I presume, in a good many different states, doesn't it?—A. In Washington, that is the only place I know.

Q. I do not mean today. I mean they have their general offices in New York and they have, as I understand it, quite some jobs throughout the various states in the union, and then they perform those jobs and the work is just done; is that correct?—A. That is correct.

Mr. SWINGLE. That is all.

* * * * *

101 The DEPUTY COMMISSIONER. Does the carpenter have any regular employer?

The WITNESS. Does he have an employer that he can consider a regular employer?

The DEPUTY COMMISSIONER. Yes; or does he get jobs
102 wherever the job is available, or whatever job may be available from any employer?

The WITNESS. That is right; the carpenter has no regular employer.

By the DEPUTY COMMISSIONER:

Q. The carpenter has no regular employer?—A. The carpenter is hired for that particular job and when that job is done he is laid off.

Q. What other methods do you employ to hire carpenters when you are a foreman on the job? You told us about going to their homes and asking him to call the next morning. Have you any other method?—A. If the job is in the city, there are carpenters out in the street looking for the job. The customary thing is to go out and take the men from the street and hire them.

Q. Do you ever apply at the union for carpenters?—A. I never have.

Q. You never have?—A. No.

Q. Is it generally the men that you know that you hire as carpenters?—A. Yes; if there is enough of them. I hire whoever I can get hold of, men that work for me most of the time.

Q. As I understand your testimony, you make sure before you ask a man to report that they will actually be able to
103 work?—A. Yes, sir.

Q. Otherwise you won't ask them to call?—A. I tell him if I have work he may start; otherwise, if it is not ready, he will have to wait.

Q. You tell them in advance that there is a chance they may have to wait?—A. Yes.

Q. When you tell them that they have been hired, they report the first thing in the morning? Assume that they wait two hours, are they paid for that two hours?—A. No, sir.

Q. They are not paid? Are they previously informed that they are not paid for the waiting period?—A. That is right.

The DEPUTY COMMISSIONER. That is all.

JOHN C. JACKSON, Assistant superintendent, testified on behalf of the employer and insurance carrier as follows:

104 By Mr. SWINGLE:

Q. By whom are you employed now?—A. The Senn-Herrick Construction Company.

Q. How long have you been employed by them?—A. I
105 have been with them approximately four years.

Q. In what capacity are you employed?—A. Assistant superintendent.

Q. You work in Washington for them or Maryland?—A. In Washington.

Q. Tell us something about the Senn-Herrick Construction Corporation. It is a New York concern, isn't it?—A. That is correct.

Q. It has no office anywhere except New York?—A. Yes, sir.

Q. No office in Maryland or Virginia or any other state?—
A. There is a Senn-Herrick Corporation in Connecticut.

Q. But that is a different corporation?—A. It is a different corporation.

Q. Do you remember a man named Everett M. Gudmundson?—A. Yes, sir.

Q. How long have you known him?—A. I think I have known him ever since I have been in Washington, three or four years.

Q. And where did you first meet him?—A. At the Mellon Art Gallery.

Q. He was working there as a carpenter?—A. That is correct.

Q. Has he been steadily on the pay roll of the Senn-Herrick Construction Corporation ever since then?—A. No.

106 Q. Did he work for other contractors; has he?—A. I believe so. I don't know. He has not been on our pay roll steadily.

Q. Now, the time we are inquiring about now is during the period he was hired in Bethesda. What sort of undertaking was going on there for the Senn-Herrick Construction Corporation?—A. It was a concrete building.

Q. That was a general hospital building?—A. A laboratory building—incidentally, the National Institute of Health.

Q. As to the circumstances of the employment of Mr. Gudmundson on that Bethesda, Maryland, job, can you tell us what you know about that?—A. I don't know what you mean by that.

Q. Did you employ him yourself?—A. I cannot say that I did. I may have seen him up on the job but I cannot swear to it.

Q. Somebody has to sign him up on the job; isn't that so?—A. That is correct.

Q. What do you mean by signing them up on the job?—
A. When they appear on the job, for instance, we may tell our foreman that we need carpenters on the job, and when the
107 carpenter comes on the job in the morning at that particular time they bring with them their name, their Social Security number, their address, and we also give them a working number.

Q. When do you consider them as actually being in the employ of your company?—A. At that time, or, I mean, if that is before seven o'clock in the morning it is a part time. Part time starts at seven-thirty in the morning.

Q. And the carpenters just go out and consider themselves hired, regardless of where they come from?—A. I do not believe that we ever call the union hall for men, although we may have, but ordinarily there are men at the job; when we start up, they appear there ever since.

Q. Do they eventually find out when they are hired on the job?—A. That is correct.

Q. Who has the authority to actually hire the carpenters?—
A. The superintendent on the job. He gives the foreman the authority to hire men or to tell the men to go to work. The superintendent will tell the foreman to have fifteen carpenters to start work at seven-thirty. I do not care how they come there, just so they are out there in the morning.

Q. Suppose fifteen would come out in the morning but you found out there were some changes in conditions or something like that and you could only use ten. Do you employ the whole fifteen?—A. We employ the ten.

108 Q. What happens to the other five? Do you have any liability to them?—A. If we call the hall and I think we need about, say, ten carpenters, and later on we find that we do not have enough work for all ten carpenters, those that we do not put to work we pay them for two hours. That is the only place where that holds true when we call the hall.

Q. In this case, you stated Mr. Gudmundson was not hired from the hall?—A. I do not believe so.

Mr. SWINGLE. That is all.

* * * * *

109 Q. Did you ever attempt to hire or fire a carpenter?—A. If I saw a carpenter and I didn't want him, I would fire him.

Q. And you have no record of the agreement between your company and the union as to your hiring and firing men?—

A. No, I do not have any record; I have the authority. That is my job.

Q. If you told a man to come to work the next day, you would expect the man to be there, wouldn't you?—A. Not necessarily. You may tell a man to be there and you cannot tell whether or not the man will appear.

Q. Were you on the job when Mr. Gudmundson started to work?—A. I think I was.

Q. You are positive? You don't know if Mr. Gudmundson was signed up to work or not?—A. No.

110 Q. You don't know if it is customary for a contractor to sign up for carpenters before they start to work?—

A. I have not seen it happen on any large job. I could tell you whether I signed them up or whether somebody else signed them up.

Q. And of your own actual knowledge, do you have authority to tell a foreman to have so many men on the job the next day?—A. The superintendent on the job.

Q. The superintendent can't tell the foreman to have so many men on the job the next day?—A. Yes.

Q. But you cannot tell him whom to have?—A. I can tell him that, too.

* * * *

112 Q. Does the foreman actually go out and hire the men before the superintendent tells him to do so?—

A. No.

Q. He does not?—A. No.

Q. He has no authority to do that?—A. No.

Q. Under no conditions?—A. Our foremen are all of the better experience. They may be on the job long before it is time to start work. If he decides to hire men two weeks before we start to work, you cannot tell him to hire men until the time has come to do so.

* * * *

113 Q. In this case the testimony has been that the foreman called at Mr. Gudmundson's home on February 23 and told him to report to work the next morning. Under those circumstances would you still say that Mr. Gudmundson was hired on the morning of that call?—A. The morning he came to work.

Q. And not the night before when the foreman told him to report?—A. No.

Q. What was the reason for that?—A. There are a lot of things covering it. He would never draw his pay until he reaches the job and starts to work. If we hired a man in Washington on the street and we had transferred him to another job and we took him from one job to another, he would be paid for the time that he was going from that job to the other. That is because he is still on our pay roll. But he would never be hired until I bring him on the job and he starts to work.

[Ex. 1 for employer]

STATE INDUSTRIAL ACCIDENT COMMISSION

Principal Office, 741 Equitable Building, Baltimore, Md.

EMPLOYEE'S CLAIM FOR COMPENSATION

INSTRUCTIONS.—Every question on this blank must be answered. The name of the claimant must be legibly inserted and claim filed within 60 days after beginning of disability. Be sure to have the correct name and address of your employer. Be sure to file, with your claim, the certificate of the attending physician, if selected by you, using Form S. F. 2.

I hereby make claim for compensation for an injury resulting in my disability, due to an accident (or disease) upon the 25th day of May, 1939, arising out of and in the course of my employment by Senn-Herrick Corporation of New York, N. Y., who is engaged in Contracting.

My claim is:

IF TOTALLY DISABLED: From what date? May 25th, 1939.

Are you now disabled? Yes. If not, on what date were you able to return to work? _____

What member of your body was injured? body.

Is the injury temporary or permanent? temporary.

IF PARTIALLY DISABLED: From what date? May 25th, 1939.

Are you still disabled? Yes. If not, on what date did disability cease? _____

By how much have your daily earnings been reduced by this injury? _____

Wages or average earnings, per week? \$60.00 per day? _____

Describe how accident (or disease) occurred. While climbing down wall forms the man slipped and fell approximately 16'0".

THE INJURED EMPLOYEE

In proof of such claim I hereby make the following statement:

Sex? Male. Age? 42. Do you speak English? Yes. If not, what language? _____

Are you married or single? Married. Where were you born? _____

State occupation when injured. carpenter.

How long have you worked at this occupation? _____

How long have you worked for present employer? 18 months.

Were you doing your regular work when injured? yes.

PLACE OF EMPLOYMENT

Location of plant where accident occurred. National Institute of Health.
 In what city or village? Bethesda, Maryland. If away from employer's
 premises or plant, state where accident occurred. _____

MEDICAL ATTENDANCE

Did you request your employer to provide medical attendance? yes.
 Has he done so? yes. What physician attended you? Dr. Walter Atkin-
son. Address of physician. 1835 Eye St., N. W., Wash., D. C., Were you
 sent to hospital? yes. If so, name and address of hospital. Emergency
Hospital, Washington, D. C.
 Where are you now? In the hospital.

Signed, this 12th day of June, 1939, at Washington, D. C.

(Injured employee making claim, sign full name here.)

(X) his mark signed by Mrs. Everett Gudmundson.

(Give full address to which mail should be sent.)

538 10th Street, S. E., Washington, D. C.

[Ex. 3 for employer]

STATE INDUSTRIAL ACCIDENT COMMISSION
741 Equitable Building, Baltimore, Md.

254912

Everett Gudmundsen (Employee)
Senn-Herrick Corporation (Employer)
Travelers Insurance Company (Insurer)

AWARD OF COMPENSATION

After due consideration of the above-entitled case it is found that Everett Gudmundsen was injured on the 25 day of May 1939, while in the employ of Senn-Herrick Corporation that his injuries consisted of laceration of face, left side; fracture left wrist; fracture sixth dorsal vertebrae; that his average weekly wage was \$60.00, and that he was temporarily totally incapacitated as a result of said injuries.

It is, therefore, this 26 day of June 1939, by the State Industrial Accident Commission, Ordered that compensation at the rate of \$20.00 per week, payable weekly, be paid to the said Everett Gudmundsen by Senn-Herrick Corporation, employer, and Travelers Insurance Company, insurer, during the continuance of his disability subject to the provisions of the Workmen's Compensation Law, compensation to begin as of the 29 day of May 1939, and that final settlement receipt be filed with the Commission in due time, subject to further consideration if disability becomes permanent.

WILLIAM F. BROENING.
CHARLES S. WARNER.
RENO S. HARP.
FRANK F. LUTHARDT.
JAMES H. PUGH.

R. O. HARRISON,
Director of Claim Division.